

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





*Orig w/ affidavit of mailing*

**76-1030**

*B  
P/S*

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 76-1030**

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

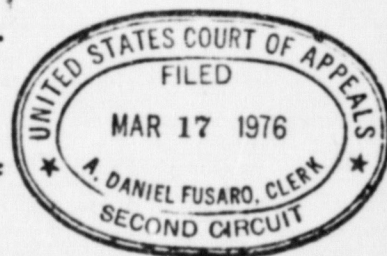
SIMON BRACH,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**GOVERNMENT'S APPENDIX**

DAVID G. TRAGER,  
*United States Attorney,  
Eastern District of New York.*



## INDEX

	PAGE
Transcript of Hearing Held on October 21, 1975 .....	A 1-A 107
Decision and Order of Judge Bartels in <i>Brach v. United States</i> , 75 C 1069, dated March 9, 1976 .....	A 10 <sup>a</sup> -A 118



1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK  
3

4 -----x  
5 UNITED STATES OF AMERICA,

6 -against -

7 SIMON BRACH and ITSHAK BIKEL,

75 CR 403

8 Defendants  
9 -----x

10 United States Courthouse  
11 Brooklyn, New York

12 October 21, 1975  
13 2:30 p.m. o'clock

14 B E F O R E :

15 HONORABLE JOHN R. BARTELS,

16 U. S. D. J.  
17  
18

19 \* \* \* \* \*  
20  
21  
22  
23

24 ILENE GINSBURG  
25 OFFICIAL COURT REPORTER

1 APPEARANCES:

A 2  
2

3 DAVID G. TRAGER, ESQ.  
4 United States Attorney for the  
5 Eastern District of New York

6 BY: RICHARD APPLEBY, ESQ.  
7 Assistant U. S. Attorney

8 YOUTT & THAL, ESQS.  
9 Attorneys for Defendant Brach

10 BY: HARRY YOUTT, ESQ.  
11 Of Counsel.

12 MARION SELTZER, ESQ.  
13 Attorney for Defendant Bikel.

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1 MR. APPLEBY: Government is ready, your Honor.

2 THE COURT: All right.

3 MR. APPLEBY: There are motions on the  
4 calendar for this afternoon.

5 One is a motion to suppress by Mr. Brach,  
6 and then there is a motion by Mr. Bikel to suppress  
7 the photo identification.

8 MS. SELTZER: At this time I withdraw my  
9 motion to suppress the photo identification.

10 THE COURT: You present Itshak Bikel?

11 MS. SELTZER: Itz-shak.

12 THE COURT: You are not going to be here  
13 then?

14 MS. SELTZER: I am here.

15 THE COURT: Are you going to be here during  
16 the suppression motion?

17 MS. SELTZER: Yes, as an observer, and I wrote  
18 a letter to Mr. Appleby and sent a copy to you.

19 THE COURT: I didn't get it yet.

20 MR. APPLEBY: I received a letter --

21 THE COURT: Maybe I did. What did it say?

22 MS. SELTZER: I hadn't any motions to serve  
23 up until this time because I was advised there was  
24 no Bruton problem.

25 Mr. Appleby said that he would give me the

1 statement of Mr. Brach.

2 MR. APPLEBY: You will hear the statement of  
3 Mr. Brach where he implicates Mr. Bikel.

4 THE COURT: Well, we will have to wait and  
5 see.

6 You mean you are going to redact his oral  
7 statement?

8 MR. APPLEBY: That's correct. The statement  
9 will make sense even with the redaction, I think  
10 you will find.

11 I have instructed the witness not to make  
12 the statement in open Court.

13 THE COURT: You want to put your witness on?

14 MR. APPLEBY: I understand Mr. Youtt is going  
15 to put his witnesses on the stand.

16 MR. YOUTT: If you would prefer to hear the  
17 Government witnesses first, that's all right with me.

18 THE COURT: I think the Government witnesses  
19 must go first.

20 MR. APPLEBY: The Government calls Gerry  
21 O'Neill.

22  
23 (Continued on next page.)  
24  
25



O'Neill - direct

5

GERALD O'NEILL, called as a witness,  
having been first duly sworn by the Clerk of the  
Court, testified as follows:

DIRECT EXAMINATION

BY MR. APPLEBY:

Q Agent, by whom are you employed?

A U. S. Customs Service.

Q How many years have you been so employed?

A Seven years.

Q And can you briefly describe to Judge Bartels  
what your duties encompass?

A For the past couple of years, basically in-  
vestigating cargo theft and hijacking from the pier area,  
and from JFK Airport.

Q Are you the case agent in charge of the case,  
United States v. Itshak Bikel and Simon Brach?

A Yes.

Q Did you have occasion to arrest the defendant  
Simon Brach?

A Yes.

Q Do you recall what date that was?

A Yes, it was April 20th of this year.

Q Could it have been April 21st?

A Yes, it could have been the 21st.



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Q Where did the arrest occurred?

A Brooklyn Federal Court -- not the Federal Court -- Supreme Court.

Q What was Mr. Brach doing in the Supreme Court?

A He was about to be arraigned on an offense allegedly involving a bad check.

Q Prior to your seeing Mr. Brach in the Brooklyn Supreme Court, did you have a warrant for his arrest?

A Yes.

Q Was that issued by the --

THE COURT: Ms. Seltzer, is your client here?

MS. SELTZER: Yes, your Honor.

THE COURT: I don't see him -- oh, he's here.

Q Prior to your meeting Mr. Brach at the Brooklyn Supreme Court, did you have an arrest warrant in your possession for Mr. Brach's arrest?

A Yes.

Q That was issued by the U. S. Magistrate Max Schiffman?

A Correct.

Q Did you place Mr. Brach under arrest at the Brooklyn Supreme Court after his arraignment?

A Yes.

Q Where did you take him after you placed him under arrest?

A He was taken to our office, 6 World Trade Center in Manhattan.

Q Approximately what time was that?

A He was arrested after lunch. About 1:00 -- we probably arrived at my office 1:00, 1:30

Q Could you tell Judge Bartels what occurred at your office in the World Trade Center with respect to the defendant Brach?

A Yes.

First he was photographed and booked, fingerprinted. Then he was escorted up to my office on the fifth floor.

He had been advised of his rights at the time he was arrested.

THE COURT: He was advised of his rights?

THE WITNESS: He was advised of his rights at the time of arrest in Brooklyn.

After he was booked in my office, I re-advised him of his rights.

THE COURT: Let me understand this.

You had a warrant for the arrest which you accomplished in the Brooklyn Supreme Court.

Did you advise him of his rights right then and there?



1 O'Neill - direct

2 THE WITNESS: Right then and there.

3 THE COURT: Was that inside the Courthouse?

4 THE WITNESS: To be completely exact, it was  
5 in the car. We had a car waiting in front of the  
6 Courthouse.

7 THE COURT: I see. That's right across the  
8 street here, the State Supreme Court.

9 THE WITNESS: Yes.

10 THE COURT: Then you took him to 6 World Trade  
11 Center and you had him photographed, fingerprinted,  
12 and then you advised him of his rights again;  
13 right?

14 THE WITNESS: Yes, sir.

15 BY MR. APPLEBY:

16 Q Incidentally, Agent, when you advised him of  
17 his rights near the Brooklyn Supreme Court, were you reading  
18 from anything or did you do it from memory?

19 A I always read from a card.

20 THE COURT: That doesn't exactly answer the  
21 question.

22 You were reading both times from the card?

23 THE WITNESS: Yes.

24 Q Could you produce that card, please, Agent?

25 A I hope so.

MR. APPLEBY: I ask this advice of rights form be marked as Government Exhibit 1 at the hearing.

THE CLERK: Government Exhibit 1, hearing Exhibit 1, advice of rights card.

(So marked.)

MR. APPLEBY: I would ask it be moved into evidence.

MR. YOUTT: No objection.

THE CLERK: Marked in evidence.

(So marked.)

MR. APPLEBY: With your permission, your Honor, I am going to dispense with Agent O'Neill reading the entire card.

THE COURT: Let me see the card.

(Handing.)

(Pause.)

THE COURT: All right.

Well, did you ask him whether he understood his rights?

THE WITNESS: Yes, I did.

THE COURT: What did he say?

THE WITNESS: He said he understood his rights.

THE COURT: Both times?

THE WITNESS: Yes.



BY MR. APPLEBY:

Q After you advised him of his rights and he said he understood them, did you question the defendant in your office?

A Initially we filled out a standard form. I asked the defendant for his date of birth and Social Security number, pedigree information.

After completing that, I asked if he was willing to make a statement of any kind.

THE COURT: Did you ask him to sign anything?

THE WITNESS: I don't believe so.

Q Continue, please.

A I asked if he'd been willing to make a statement.

I will try to recount it exactly as it occurred.

He indicated to me that he was willing to make a statement but initially did not specify anything. We were talking in generalities. I explained I thought we had a good case against him without going into details per se but reflected somewhat on the case as I understood it.

He seemed to be receptive to my suggestion that it was a good case.

Midway through the interview, he made a statement. The interview was conducted, by the way, with

O'Neill - direct

one of the agents I work with, Edward Adamson.

THE COURT: You were there?

THE WITNESS: Yes, I was doing the interviewing.

THE COURT: It was done through Edward Adamson?

THE WITNESS: During the entire interview, Ed Adamson was with me.

THE COURT: He didn't conduct the interview?

THE WITNESS: No, he didn't, no.

Mr. Brach said to me in effect, "The load is in tact. It's still around."

I took it to be a form of admission.

I immediately called Mr. Appleby and advised him -- let me interrupt -- Mr. Brach said to me, after he made this admission of sorts, that he wished to speak with a United States attorney.

THE COURT: He said that?

THE WITNESS: It was his suggestion.

BY MR. APPLEBY:

Q Did he specify a particular United States attorney?

A I don't believe so. But I saw no possible reason not to grant his request and I telephoned Mr. Appleby.



O'Neill - direct

A 12 12

We then terminated the interview, drove over to this building, arriving here about 3:00.

At this point I was escorted now by Peter Reilly.

THE COURT: Who is he?

THE WITNESS: He is sitting at the prosecutor's desk.

THE COURT: But who is he?

THE WITNESS: He is a special agent with the United States Customs Service.

BY MR. APPLEBY:

Q Approximately how long did the entire processing and fingerprinting and questioning of Mr. Brach take at the World Trade Center?

A I don't think it took too much more than an hour.

Q You arrived at the U. S. attorney's office approximately 3:00 p.m.?

A Approximately.

Q There came a time when Mr. Brach was escorted to my office?

A That's correct.

Q Tell Judge Bartels what occurred after Mr. Brach arrived in my office?

1  
2 A I believe you read him his rights again.  
3 We -- Mr. Brach asked you, as best I can remember --

4 Q Did Mr. Brach say he understood his rights?

5 A Yes. It was difficult reading his rights.  
6 He kept saying, "I understand," "I understand," "I understand,"  
7 but as a matter of policy, we read the rights and request  
8 they state whether or not they understand the rights,  
9 which he did.

10 Q Could you briefly describe Mr. Brach's  
11 mood at this time, his actions?

12 A Very cooperative, basically, almost light-  
13 hearted and giddy.

14 At one point in my office, he had become  
15 rather serious for a brief interlude but for the most part  
16 he was extremely cooperative and in amazingly good spirits,  
17 I thought.

18 Q Continue with what occurred in my office.

19 A He asked if he could speak with Mr. Puccio,  
20 who was your supervisor -- I forget Mr. Puccio's title --  
21 and apparently you went and spoke with Mr. Puccio and came  
22 back and stated something to the effect, if he wanted to  
23 make a statement, it would be to you and myself and Mr. Reilly  
24 that the statement would be made and was he willing to make  
25 a statement.



He asked -- said something to the effect, "Well, what's in it for me? Can I get immunity on this," at which point he was immediately told, "No." You rather emphatically told him, "No."

Mr. Appleby said emphatically, "No," no promises would be made.

Q Was there anything stated with respect to his cooperation in terms of what sentence he may receive?

A Please repeat?

Q Was there anything stated with respect to what would be brought to the attention of the sentencing judge if he was sentenced?

A Yes.

Mr. Appleby told Mr. Brach that should he make a statement and cooperate, any and all cooperation would be brought to the judge's attention that would be hearing the case.

Q Would you continue, please?

A Apparently Mr. Brach found that to be a suitable arrangement and he advised that he would make a statement relevant to the incident that occurred on March 5, 1975, which is the date of the theft which had occurred.

Q Could you tell us what Mr. Brach's statement was?

A Yes.

He stated that on the morning of March the 5th, he, together with an individual, Itshak Bikel, were driving along the Brooklyn-Queens Expressway heading toward the Williamsburgh section of Brooklyn, when he, Brach, saw a Fried Trading truck directly in front of them, apparently running from the pier area.

THE COURT: What kind of truck?

THE WITNESS: Fried -- F-r-i-e-d.

THE COURT: That's the name of the owner?

THE WITNESS: Yes, Fried Trading truck.

THE COURT: Is that is relative?

THE WITNESS: Yes.

THE COURT: Fried?

MR. APPLEBY: He's the stepson of Itshak Fried, one of the owners of the Fried Trading Company.

THE COURT: What happened?

THE WITNESS: Brach had stated prior to that that he's been an employee of Fried Trading; he'd been a driver.

He recognized the truck because of the fact that he was previously employed with the company.

He stated they followed the truck to the Fried office at Clymer Street, 167 C-l-y-m-b-e-r Street.

He stated in effect that as they were following



O'Neill - direct

16

the truck, he had stated to Bikel that he planned on stealing the truck.

He had also stated to us that prior to March 5th, I believe it was March the 3rd, he had gone to the Fried Trading office at 160 Clymer Street. He spoke with his step-brother Nachman Brach or Nachman Fried, and asked for a loan and the loan was refused, and apparently harsh words were exchanged and he left mad, made a threat of sorts -- I believe he stated to the effect that -- "I will get you."

He said that upon arriving at the office, he saw the driver exit the truck.

The truck, by the way, I think it is a 20-foot truck --

BY MR. APPLEBY:

Q Just tell us what Mr. Brach said.

A The driver left the truck, went into the Fried's office. Brach stated that he went over to the truck and that he had in his possession one or more keys for either one or more vehicles that Fried Trading Company owns.

He said he had the keys because of the fact that he had been a driver and for some reason, he had

these keys in his possession.

He stated that he found a key that opened the truck. He opened the door to the truck, put it in reverse. The truck was parked in front of the company. It wasn't in the garage. Apparently the garage was blocked or for whatever reason, the driver had not effected the delivery into the actual premises.

He put the car in reverse, the truck in reverse, which was on the street, drove back, rather quickly, to Division Avenue, I believe, is the street, it's a one-way street -- he was going in the wrong direction on the street in reverse.

He went to Division Street and took off on the Brooklyn-Queens Expressway. He stated that he wasn't aware of where he was taking the truck, but that from the feel of the load, it contained a substantial load, radios probably; that he proceeded to Kent Avenue. He has a friend at Kent Avenue, Abe Stern. And in front of the premises Abe Stern rents space in is a parking area, a parking lot of sorts. He decided to proceed there.

He had previously told Bikel, prior to the time he took the truck, that he was going to take the truck and he asked Bikel to assist him in the theft and apparently -- Brach said Bikel replied in the affirmative;



O'Neill - direct

18

1  
2 That when he entered the truck, he told Bikel to follow  
3 him in his car -- Brach drives a '63 blue Plymouth, I  
4 think -- and Bikel's job was to follow the truck where he  
5 went -- Brach -- to.

6 I believe it was the Do-Re-Mi Knit Corpora-  
7 tion on Kent Avenue.

8 Brach decided to contact Vincent Mancini  
9 and advised he knew him for several years.

10 Q Could that be Louis Mancini?

11 A Yes, Louis Mancini.

12 By this time he opened the truck and saw the  
13 contents were eight-track stereo units to be used in an  
14 automobile.

15 He called Mancini up and advised him that  
16 he had a full load of Mecca, M-e-c-c-a stereo audio units.

17 Q Do you know the value of the units?

18 Mr. Brach didn't state this but do you know  
19 the value?

20 A No -- well, I am told the retail value of  
21 each unit is slightly in excess of a hundred dollars.

22 There were about a thousand, so it was ap-  
23 proximately \$100,000. He didn't tell me that.

24 THE COURT: These are for a car?

25 THE WITNESS: Yes.

BY MR. APPLEBY:

Q Continue.

A He called Louis Mancini and advised him he had in his possession a load of units and wanted to sell them.

He stated Mancini expressed immediate interest in buying the units and asked for directions where to go and said he would get there as quickly as he could get there.

He said that he then asked Bikel to go rent a truck because there was going to be -- this is a big truck, 20-foot truck, and he need a truck to cart the merchandise away.

He said that Bikel took off in his car, this Plymouth I earlier referred to.

THE COURT: Well, did he say that Bikel had told him?

THE WITNESS: Yes. I will go back and make sure I haven't missed anything.

Yes. He had directed Bikel to follow him and Bikel did follow him to this address at Kent Avenue.

He telephoned, found that he had a buyer, then asked Bikel to rent a truck so they could cart



1 O'Neill - direct  
2 the stolen merchandise away.

3 He stated that approximately an hour later,  
4 this Louis Mancini arrived at the Kent Avenue ad-  
5 dress and was driving a green panel truck and said  
6 that Mancini had one male individual with him who  
7 he knew only as "Junior" and he believed Junior  
8 was Mancini's son.

9 BY MR. APPLEBY:

10 Q Do you know who Junior is?

11 A Yes. That is Angelo Rosario.

12 Q Continue, please.

13 A He stated they proceeded to unload from  
14 the Fried Truck into this green van the contents; that  
15 some time thereafter, Bikel arrived at the location and  
16 Bikel was driving a U-Haul truck and I believe this was  
17 a 20-foot truck as well.

18 He stated that himself, Bikel, Mancini and  
19 Junior -- Angelo Rosario, succeeded in unloading all of  
20 the merchandise from the Fried truck into both the van  
21 and into the rented U-Haul; that --

22 THE COURT: You mean the U-Haul didn't --  
23 why did he put it in two trucks?

24 THE WITNESS: The van is a small van. There  
25 wasn't enough room.

1  
2 THE COURT: They had to have two things?

3 THE WITNESS: Perhaps there was enough room  
4 in the U-Haul to put the entire load in. I don't  
5 know, nor do I believe I inquired into that.

6 But the fact is that Brach stated that both  
7 of the trucks were loaded and that Mancini drove off  
8 in the green van and that Junior or Angelo Rosario  
9 drove off in the U-Haul.

10 He stated that he had been given a partial  
11 payment at this time by Mancini -- in Mr. Appleby's  
12 office.

13 This wasn't an in-depth interview. It was  
14 rather speedy and he stated something to the effect  
15 as to the amount of money that Mancini had offered  
16 to pay him for this load, and I think he said  
17 \$20,000, but I am not sure.

18 He did state, however, that a payment of  
19 some sort had been made on the spot at this time  
20 and that after payment had been made and after the  
21 trucks had been loaded, the trucks were driven  
22 off by Mancini in the van and by Rosario driving  
23 the U-Haul.

24 THE COURT: Bikel took no part in that?

25 THE WITNESS: Not in the driving.



O'Neill - direct

22

Bikel, after he arrived back at the yard, assisted in the unloading of the merchandise from the Fried truck into the U-Haul truck.

THE COURT: Then, as I understand it, Brach and Bikel just remained at Kent Avenue; is that right?

THE WITNESS: I don't recall that we continued the interview in this direction as to what their activities were for the rest of the day.

I think we went on to another area of the investigation from here; is that correct?

BY MR APPELBY:

Q Why don't you finish the statement and then we will tell Judge Bartels what happened after you tell us about these individuals.

A Brach stated approximately -- well, as a matter of fact, he said specifically -- well, I believe it was April the 15th -- I don't know why he would have remembered the date or how he arrived at that date -- but he stated on April 15th, he had driven out to Carteret New Jersey, where Mancini lives -- 8 George Court, in Carteret -- and he wanted some more money.

He said he was met at the house by Al Greco, who he believes is Mancini's son-in-law; that Al Greco

1  
2 advised him that Mancini wasn't at home; that he was in  
3 Florida but that he, meaning Greco, could get some money  
4 for Brach.

5 He stated that Greco telephoned somebody  
6 named John; that Greco advised him that he should fol-  
7 low Greco and he did.

8 He said they drove from the residence in  
9 Carteret, south into New Jersey, for about 40 minutes;  
10 that they arrived at a private house, entered the private  
11 house. He was introduced to John -- no last name; that  
12 John, after speaking briefly with Al Greco, gave Greco  
13 \$500 and Greco immediately gave the \$500 to Brach in  
14 John's presence.

15 This John was later identified as John  
16 Paperwik.

17 Then he also said, at this time Greco asked  
18 Mr. Paperwik if he could have any more of the radios and  
19 Paperwik answered to the effect that it was still light  
20 out.

21 He didn't want to go to the truck while it  
22 was still light.

23 THE COURT: Greco asked Paperwik or vice versa?

24 THE WITNESS: Greco asked Paperwik.

25 THE COURT: Well, how did Paperwik get these



stereos?

THE WITNESS: I will try to get to that,  
your Honor. I will go back a little bit.

When Brach and Grecco arrived at this house  
in Marlboro Township, it was later learned, Brach saw a  
large truck parked in front of the house Paperwik lived in.

THE COURT: But he didn't know anything  
about Paperwik before that?

THE WITNESS: He didn't know who he was.  
He was just going to get some money.

Greco said if he follows him, he'll get  
some money.

They arrive at the house. He was introduced  
to John. John gave \$500 to Geco and Greco gave it  
to Simon.

Then Mr. Brach testified that Greco asked  
for more radios. Paperwik said, "No, wait until  
it gets dark."

Mr. Brach took this to mean that the truck  
in front of the house, no more than 20 feet from  
the front entrance, was the truck John was referring  
to and that the automobile stereo units were in  
the truck.

THE COURT: Well, there is sort of a hiatus

1  
2 there.

3 THE WITNESS: If you say so.

4 THE COURT: Well, we find that Brach comes  
5 to Carteret to see Mancini.

6 Well, after that he also sees a truck, a big  
7 truck parked in front of someone's house who finally  
8 is discovered to be Paperwik; right?

9 MR. APPLEBY: That's correct.

10 THE COURT: Greco says he'll have to talk to  
11 John to get \$500. John gives Greco \$500 which in  
12 turn is turned over to Brach. But we never find  
13 out how the stereos get into Paperwik's truck.  
14 There is sort of a hiatus there, isn't there?

15 MR. APPLEBY: Correct.

16 THE WITNESS: This is what Brach told us.

17 THE COURT: Did he tell you anything further?

18 THE WITNESS: Well, I will continue.

19 THE COURT: We will go ahead inspite of the  
20 hiatus.

21 BY MR. APPLEBY:

22 Q After Mr. Brach provided us with this  
23 information, what did I do?

24 A You probably asked where --

25 THE COURT: No. Do you remember what he



1  
2 did or don't you?

3 THE WITNESS: No, I don't know what you are  
4 referring to, Mr. Appleby.

5 BY MR. APPLEBY:

6 Q Was anything done with respect to warrants?

7 A Yes.

8 Q Could you tell us, please?

9 A Yes. You initiated the proceedings to get  
10 arrest warrants for four individuals.

11 Q And did I write out the arrest warrants  
12 right in front of Mr. Brach?

13 A We prepared a complaint.

14 Q How was this complaint prepared?

15 A It was prepared basically by questioning  
16 Mr. Brach.

17 Q And I was writing the statement as Mr. Brach  
18 was telling me the details?

19 A We were preparing the complaint based on  
20 the details being given to us by Mr. Brach.

21 Q Approximately what time is this, now?

22 A Approximately 4:00 to 4:45.

23 Q Now, were any arrangements made with  
24 Mr. Brach and the agents to find this load of stereos?

25 A Yes, there were.

Q Tell us what happened?

A Well, Mr. Brach volunteered the fact that he could find the house he had been to on April 15th, where the truck was parked and where he was certain that "X" number of the stolen units were in tact.

Q Continue, please.

A I called up some agents that were working the case with us from my office. We decided that myself and Mr. Reilly and Mr. Brach would attempt to find the house referred to --

THE COURT: This is in Carteret?

THE WITNESS: No. There is two residences, the Carteret residence is where he went to see Mr. Mancini.

THE COURT: What house are you looking for, now?

THE WITNESS: The one in South New Jersey. We didn't know where it was.

THE COURT: What was supposed to be there, a truck?

THE WITNESS: Mr. Brach was under the impression that what he had seen on the 15th would be there, and hopefully there would be a very large percentage of the radios in that truck.



We were trying to make a recovery.

THE COURT: We skipped over Mancini's place in Carteret and now we're in south Jersey where Mr. Brach thinks the truck will be.

THE WITNESS: Yes. He doesn't know where it is. He thinks if we go down there we can find it by memory.

He couldn't describe it or name it. He was certain if we all went to south Jersey, we could find the place where he received the \$500.

THE COURT: I thought he received the \$500 in Carteret.

THE WITNESS: No. He went to Carteret and then followed Mr. Greco about 40 or 45 minutes to south Jersey.

THE COURT: You didn't say that after the Carteret affair, Mr. Greco took him to a house in south Jersey.

THE WITNESS: I thought I had. If not, I will repeat it.

He followed Mr. Greco to a place approximately 40 minutes south and it was in this house that he saw the house he thought the radios would be in.

1  
2 BY MR. APPLEBY:

3 Q So he knew where Mancini' resided but not  
4 where the cab was and where he presumed the stereos to be?

5 A Right.

6 Q Then you made arrangements with fellow  
7 agents to take Mr. Brach down to south Jersey to look for  
8 the units?

9 A Yes.

10 Q Were any arrangements made at that point  
11 with respect to Mr. Brach's arraignment?

12 A Yes. Normally an arraignment would transpire  
13 at this point. We decided the time factor would be such  
14 that it wouldn't be feasible.

15 Q When you say, "The time factor wouldn't be  
16 such," are you talking about the goods?

17 A Well, we were all entered in establishing  
18 the location of the residence and were hoping to get the  
19 ball on the road and get started.

20 Mr. Brach knew he was going to be arraigned  
21 either then or at a future date and volunteered that  
22 it was necessary to be arraigned and inquired if it could  
23 be had at another time.

24 Q Were documents prepared with respect to  
25 Mr. Brach's arraignment?



O'Neill -- direct

30

A You prepared a document relative to Mr. Brach, relevant to a postponement of and an arraignment.

MR. APPLEBY: I request this document be marked as Government Exhibit 2 for the hearing.

THE CLERK: Document dated April 21, 1975, marked for the hearing as Government Exhibit 2.

(So marked.)

MR. APPLEBY: I previously supplied Mr. Youtt and Mr. Thal with a copy of this statement.

BY MR. APPLEBY:

Q I show you Government Exhibit 2, Agent O'Neill, and ask you if you can identify it.

A Yes. This is the document that was prepared in your office, Mr. Appleby's office, on the 21st.

It says: At 3:00 p.m., where he waived his right to a speedy arraignment.

Q Don't tell us what it says. That's the document?

A That Mr. Brach signed.

Q Does it indicate what time he signed it?

A Yes, 4:58 p.m.

Q Does it indicate when he was brought into my office?

1 O'Neill - direct

2 A 3:30 p.m.

3 THE COURT: What the date?

4 MR. APPLEBY: April 21st.

5 Would you like me to read it?

6 "I, Simon Brach, am aware that I have a  
7 right to be brought before a U. S. Magistrate  
8 immediately after my arrest today, April 21, 1975,  
9 at 3:30 p.m. However, I waive my right to a speedy  
10 arraignment and agree to be arraigned tomorrow,  
11 April 22, 1975, so that I may assist representatives  
12 of the United States Government in locating goods  
13 which I have previously stolen and sold to several  
14 individuals who, in turn, transported the goods  
15 to New Jersey.

16 "I have previously been read my Miranda  
17 warnings by Richard Appleby, Assistant U. S.  
18 Attorney, in his office in the presence of Gerald  
19 O'Neill and Peter Reilly, U. S. Customs agents,"  
20 and it is signed and witnessed by Brach, myself,  
21 Gerry O'Neill, Pete Reilly signed, "Simon Brach,"  
22 and the time is recorded as 4:58 p.m.

23 BY MR. APPLEBY:

24 Q After Mr. Brach signed the document, tell us  
25 what transpired thereafter.



1  
2 A Yes. I asked that several agents go over  
3 to the vicinity of Carteret, New Jersey -- oh, after the  
4 arrest warrants had been prepared and given to me, this  
5 was after --

6 Q There was a period of time when arrest  
7 warrants were prepared for these four individuals; correct?

8 A Yes, sir.

9 Q And there was a time I went down to the  
10 Magistrate's office to procure these warrants?

11 A Correct.

12 Q And then I procured them and gave them to  
13 you and fellow agents of the Customs Service?

14 A Correct.

15 Q Then what occurred?

16 A Several of the agents were instructed to go  
17 down to Carteret but not to take action or serve the  
18 warrants until hearing from us.

19 We, in turn -- specifically, Reilly, myself  
20 and Mr. Brach, in my car, drove down to the vicinity of  
21 Marlboro Township in New Jersey.

22 We were being guided specifically by Brach.  
23 We didn't know where we were going other than his direc-  
24 tions.

25 We arrived in a remote area. It was dark by



1  
2 now and completely on Mr. Brach's advice, we proceeded  
3 to drive up and down specific roadways and highways hoping  
4 that he would be able to remember the area that he had  
5 been in the preceding week.

6 We spent several hours trying to locate  
7 that particular house with negative results.

8 It was dark, it was difficult, practically  
9 impossible, and we gave up later in the evening.

10 We contacted the agents who were up in  
11 Carteret and advised them no action was to be taken in  
12 serving these arrest warrants that evening.

13 They went home. We in turn proceeded back  
14 to Manhattan and we dropped Mr. Brach off at the West  
15 Street Federal Penitentiary for the evening.

16 Q Approximately what time was that?

17 A I would say it was late. We spent hours  
18 and hours looking for the house.

19 I would say it was 11:00. It could have been  
20 later. It was late in the evening.

21 Q Tell us what happened the next day, please.

22 A Yes.

23 Q Go ahead.

24 A We picked Mr. Brach up. I guess it was the  
25 late morning. I was with another agent at this time,

1  
2 James Healy.

3 Healy, Simon and myself again proceeded  
4 south into New Jersey to that area I keep referring to,  
5 Marlboro, because that's the only town I recall offhand  
6 where we were near and subsequently the truck was found.

7 We spent several hours driving around, as  
8 the previous evening, looking for something that would  
9 spark -- something Mr. Brach would remember that he  
10 had seen.

11 At about 2:00 o'clock in the afternoon, he  
12 recalled something and that this was the place he had  
13 been the preceding week. We passed a house with a big  
14 truck and he stated that he was emphatically certain this  
15 was the house.

16 Q Now, do you know what I did with respect  
17 to procuring a search warrant for that truck?

18 A I basically remember what you did.

19 I remember we couldn't take very many steps  
20 in obtaining one until we found the house and at this  
21 point it was somewhat uncertain if we were ever going to  
22 find it.

23 Upon seeing it was definitely the house and  
24 truck Mr. Brach had reason to believe the stolen merchandise  
25 was in, I telephoned you, got as good a description as



O'Neill - direct

35

1  
2 we could --

3 THE COURT: Where was this house?

4 THE WITNESS: Marlboro Township. I don't  
5 remember the exact address.

6 THE COURT: All right.

7 Q Would you continue with what happened with  
8 respect to the search warrant?

9 A Yes. I telephoned you, advised you of what  
10 we had located. You in turn had been in touch either  
11 at my direction or as a matter of mutual convenience  
12 Mr. Reilly, who was either at your office or proceeded  
13 to your office.

14 Q Did Mr. Reilly pick up a draft of a search  
15 warrant from me?

16 A Yes, he did.

17 THE COURT: Who is Reilly?

18 THE WITNESS: The other customs agent.

19 MR. APPLEBY: He is here in Court, your  
20 Honor.

21 THE COURT: What did Reilly do?

22 THE WITNESS: He picked up from Mr. Appleby  
23 a rough draft, as I understand it, of the search  
24 warrant Mr. Appleby was preparing on my directions  
25 from the scene in New Jersey, and then Reilly went

O'Neill - direct

36

over to the Federal Court in Newark and together with an attorney over there and a magistrate, prepared a search warrant.

BY MR. APPLEBY:

Q Then what was done with the search warrant?

A That in turn was given to another one of the agents that was working on this case with me, James C-o-b-l-e.

Coble went up -- he had driven from the residence in Marlboro Township, New Jersey, to the Federal Court in Newark and by the time he arrived there, the magistrate had succeeded in drawing up the search warrant for the truck that we were seeking the warrant --

THE COURT: We need all those kinds of details?

The fact that a magistrate issued a warrant --

THE WITNESS: He issued the warrant. Coble knew where the house was, drove down to New Jersey and gave me the warrant.

Q Did you serve the warrant?

A Yes. The search warrant and the arrest warrant.

Q Were the individuals arrested that day?

A Well, Mr. Paperwik was arrested at his



O'Neill - direct

37

1  
2 residence in Marlboro. I asked him if he had any Mecca  
3 stereo units in the truck.

4 THE COURT: Aren't we getting away from the  
5 suppression?

6 Q There came a time when the four individuals  
7 were arrested, the search warrant executed?

8 A Yes.

9 Q And a seizure made as a result of that search  
10 warrant; correct?

11 A Yes.

12 Q Now, when you were down in New Jersey or  
13 wherever you were the next time, did there come a time  
14 when Mr. Brach executed another waiver?

15 A Yes.

16 MR. APPLEBY: Would you please mark this?

17 THE CLERK: Government Exhibit 3 for the  
18 hearing, document dated 4/22/75.

19 (So marked.)

20 MR. APPLEBY: Your Honor, I previously  
21 provided a copy of this to defense counsel.

22 Q Agent O'Neill, I show you Government 3. Do  
23 you recognize that document?

24 A Yes.

25 Q Tell us what it is.

O'Neill - direct

38

1  
2 A This is a waiver signed by Mr. Brach on  
3 April 22nd, waiving his right for an arraignment on that  
4 day.

5 Q When was that statement made or signed by  
6 Mr. Brach?

7 A On April 22nd at 3:20, it says.

8 THE COURT: That's the next day.

9 MR. APPLEBY: That's correct.

10 The first day they weren't able to locate  
11 the goods, and on the second day he executed a  
12 waiver.

13 With your permission, I will read it again.

14 THE COURT: I will bet it's the same thing  
15 so you don't have to read it.

16 BY MR. APPLEBY:

17 Q Now, after the goods were located, did  
18 there come a time that very day when Mr. Brach was ar-  
19 raigned?

20 A He was arraigned --

21 Q In the United States Courthouse?

22 A The next day.

23 THE COURT: Is that the 22nd or 23rd?

24 Q The 23rd; is that correct?

25 A Yes, the 23rd.



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THE COURT: Was that here, of course?

Q U. S. Courthouse, Eastern District?

A Yes.

Q Were you present at this arraignment, agent?

A Yes.

THE COURT: I guess I was present, too.

MR. APPLEBY: No. This is with respect  
to the arrest warrant of Mr. Brach.

THE WITNESS: I see. All right.

Q Where was Mr. Brach lodged the morning  
before the arraignment?

A He was taken over by one of the agents  
from our Newark office to the Hackensack jail.

We have facilities there to utilize.

THE COURT: I just think we're talking  
about a lot of details unnecessary to this suppres-  
sion hearing.

MR. APPLEBY: I think the fact that  
Mr. Brach was lodged at the Hackensack jail would  
have left no doubt in his mind that he wasn't  
granted immunity at that time. He was in jail.

THE COURT: Where was he before?

MR. APPLEBY: West Street.

THE COURT: From what time on?

O'Neill - direct

40

MR. APPLEBY: He was at West Street April 21st. He was in Hackensack on April 22nd and it is the Government's position that because he was in jail on both days, he could not have thought he was granted any kind of immunity.

THE COURT: Well, the matter is objective -- whether he had reason to believe that he was granted immunity or that you made any promises to him to obtain his cooperation.

Anything more?

This is a long, detailed story which, I wonder whether it is necessary in a suppression hearing.

BY MR. APPLEBY:

Q Did Mr. Brach make any statement to you at his arraignment with respect to immunity?

A No.

Q Did he complain about the fact that he was granted immunity at the arraignment?

A No.

Q Did he complain about anything?

A He was very upset at the high bail the prosecutor asked for.

Q Do you recall if Mr. Lomardo represented



O'Neill - direct

41

1  
2 Mr. Brach?

3 A Yes.

4 Q Did he say anything with respect to the  
5 fact that I hadn't lived up to the promise of immunity  
6 for Mr. Brach?

7 A Yes.

8 THE COURT: Didn't I appoint Mr. Lombardo?

9 MR. APPLEBY: No. He was appointed by  
10 Mr. Magistrate Schiffman and then there was a  
11 question about Mr. Lombardo's representation be-  
12 for you and you relieved Mr. Lombardo.

13 THE COURT: All right.

14 Do you want to cross-examine?

15 MR. YOUTT: Just a few questions.

16 THE COURT: Certainly.

17  
18  
19 (Continued on next page.)  
20  
21  
22  
23  
24  
25

1  
2 CROSS-EXAMINATION

3 BY MR. YOUTT:

4 Q Agent O'Neill, between the time you first  
5 arrested Mr. Brach at the Brooklyn Supreme Court, and  
6 you took him to the World Trade Center enroute, did  
7 you have any conversation with Mr. Brach?

8 A None.

9 THE COURT: You said in the car outside  
10 the Supreme Court, you read him his rights.

11 Didn't you say that?

12 THE WITNESS: Yes. I didn't take that to  
13 be a conversation.

14 I read his rights.

15 THE COURT: Did he say anything to you  
16 after you read him his rights?

17 THE WITNESS: Yes. We did have some conver-  
18 sation.

19 BY MR. YOUTT:

20 Q Would you relate that conversation?

21 THE COURT: That was in the car?

22 THE WITNESS: Yes, after I read his rights  
23 to him.

24 I asked where he had been for the past couple  
25 of weeks.



1  
2 B: MR. YOUTT:

3 Q Did you at that point discuss the facts  
4 of this case in any way with him?

5 A No way.

6 Q Did you discuss with him the nature of the  
7 charges being brought against him?

8 A Only to the most minimal extent possible.

9 Q Did you discuss with him in any way the  
10 subject of the cooperation?

11 A No.

12 Q Did you discuss with him in any way the  
13 subject of statements he could give or information he  
14 could give you in connection with this case?

15 A No.

16 Q When you arrived at the World Trade Center,  
17 I believe you said you conducted a pedigree interview  
18 with respect to certain vital information; is that cor-  
19 rect?

20 A Yes, sir.

21 Q Prior to that time, did you engage in  
22 any conversation other than the pedigree interview with  
23 Mr. Brach?

24 A Not really, no.

25 Q So it was thereafter that you had the

1  
2 discussions with Mr. Brach that you testified to earlier;  
3 is that correct?

4 A Yes, sir.

5 Q In those discussion was it Mr. Brach who  
6 first raised the subject of the facts of the case or  
7 was it you or someone else?

8 A To the best of my recollection, after  
9 being read his rights and after asking Mr. Brach if he  
10 was willing to make a statement, I would think -- and  
11 I am not positive -- I would think at this point I  
12 explained to Mr. Brach on a more in-depth level than  
13 I had earlier, the exact circumstances relevant to an  
14 arrest warrant having been put out on him and explained  
15 to him that he was being arrested on the issuance of an  
16 arrest warrant.

17 THE COURT: Did you say anything to him  
18 at this point about cooperation?

19 THE WITNESS: No.

20 THE COURT: At what point did you mention  
21 about cooperation?

22 THE WITNESS: I imagine --

23 THE COURT: No, you can't imagine or sus-  
24 pect this. You can't testify to that before a  
25 Jury.



O'Neill - cross - Youtt

45

1  
2 Do you recall? Did you make any state-  
3 ment, did you make any notes as to these trans-  
4 actions?

5 THE WITNESS: No, your Honor.

6 THE COURT: You have no notes and made no  
7 report?

8 THE WITNESS: The main report I have  
9 relative to the interview is the complaint.

10 To answer your question, sir, there were  
11 no notes being taken by me in my office at  
12 the initial interview.

13 THE COURT: Well, I am trying to find  
14 out when is the first time you made any state-  
15 ment as to cooperation -- when was that?

16 THE WITNESS: In my office I stated to  
17 Mr. Brach that I felt that we had a good strong  
18 case against him.

19 I explained to him the reason why he was  
20 arrested; namely, for the theft of a truck on the  
21 fifth and that as far as I was concerned, the case  
22 was such that should he go to trial, there was  
23 an excellent chance of his being convicted and  
24 I wanted to know his response to that comment.  
25

1  
2 BY MR. YOUTT:

3 Q Did you say anything else to him about  
4 the case?

5 A Yes.

6 Q Prior to his response -- what else?

7 A I stated that in the course of our in-  
8 vestigation, I had been in touch with his brothers,  
9 step-brothers, the Frieds or the Brachs, on quite a few  
10 occasions.

11 I stated that I had had several conversa-  
12 tions with his stepfather which I had both in person and  
13 on the telephone.

14 Q This would be Mr. Isaac Fried?

15 A Isaac Fried.

16 Q Go ahead.

17 A I told him they telephoned me, all three  
18 of the Frieds, on several occasions, which they had, and  
19 recently -- I can't recall how recent, but not too far  
20 prior to this date -- I had a situation with Mr. Brach's  
21 stepfather on the telephone.

22 I believe he telephoned me to find out  
23 the status of the investigation -- had we recovered  
24 any of the merchandise, and I explained the fact that  
25 Mr. Fried was very upset about this matter as were his



O'Neill - cross - Youtt 47

brothers, and that was the extent of the conversation relative to the theft in question, as best I can remember.

Q Did you say anything at this time with regard to your interest in recovering the good which were missing?

A Mr. Brach volunteered to me at about the time we were discussing the inquiries by Mr. Fried, as to whether or not recovery had been made.

I told him -- and I told Mr. Fried -- that no, a recovery had not been made; at this point we didn't know where the merchandise was and at approximately this time, Mr. Brach stated to me words to the effect, "The load is intact. It's still around."

I took this to be an admission of sorts.

Q Was this the first time Mr. Brach had said anything about the facts of this case in your presence?

A Absolutely, yes.

Q Prior to that time, you said something about, should he go to trial, there would be an excellent change of conviction.

Is that a fair statement?

A That's a fair statement based on the facts as I knew them.

1  
2 Q Did you say that to him or words to that  
3 effect?

4 A Yes.

5 Q Did you elaborate on that?

6 A No.

7 Q Did you say anything to him in connection  
8 with help you could give him?

9 A No.

10 Q After he said what he said to you about  
11 the goods still being intact, is that -- I believe you  
12 also said he asked you to put him in touch with the  
13 United States attorney; is that correct?

14 A I was just about to state this.

15 As I was about to ask a little bit more  
16 specifically what the remark meant, he stated to me  
17 that he didn't particularly at this point care to go  
18 into a lot of detail with me but he would -- he did  
19 express and interest in speaking with the U. S. attorney.

20 Q Did he say anything else about the case in  
21 that conversation?

22 A No, sir.

23 Q I take it then you called Mr. Appleby  
24 and made arrangements to come over?

25 A We came over within 15 minutes.



1  
2 Q From the time of the conversation you  
3 just related, to the time you got to Mr. Appleby's  
4 office, was anything said by you or by Mr. Brach or  
5 anyone else in your presence concerning the facts of  
6 this case?

7 A From when, sir?

8 Q From the time you spoke with Mr. Appleby  
9 on the phone, until you arrived in his office?

10 A No.

11 THE COURT: On the way from the World  
12 Trade Center to this U. S. Court, was anything  
13 said?

14 THE WITNESS: No.

15 THE COURT: You're both in the same car?

16 THE WITNESS: All three of us.

17 THE COURT: Nothing was said?

18 THE WITNESS: Absolutely not about this.

19 THE COURT: By Mr. Brach?

20 THE WITNESS: Right.

21 BY MR. YOUTT:

22 Q When you arrived in Mr. Appleby's office,  
23 he was there at that time?

24 A He was waiting for us.

25 Q That's when you and Mr. Appleby and

1  
2 Mr. Brach spoke of this case and you related that  
3 testimony before; is that correct?

4 A That's correct.

5 Q Who else was in the room besides you,  
6 Mr. Appleby and Mr. Brach?

7 A Peter Reilly.

8 Q Now, at that time I believe you testified  
9 that Mr. Brach was informed of his rights again; is  
10 that correct?

11 A Yes.

12 Q Was any discussion had about his right  
13 to consult counsel or the advisability of consulting  
14 counsel?

15 A Absolutely.

16 Q Who said what?

17 THE COURT: It's in the card and I said  
18 he didn't have to read it.

19 Q Was anything more, besides the contents  
20 of that card, said or related to Mr. Brach concerning  
21 his rights?

22 A I suspect, no.

23 Q Who was doing the -- well, was one person  
24 among the three of you on behalf of the Government,  
25 directing the inquiry at that time, or asking the questions?



1  
2 A I would say it was a joint interview  
3 between Mr. Appleby and myself.

4 Q So both you and Mr. Appleby were asking  
5 questions; is that correct?

6 A Yes.

7 Q Now at that time, did you or Mr. Appleby,  
8 in your presence, say anything to Mr. Brach about the  
9 interest of the Government in recovering the goods?

10 A No.

11 Q Nothing at all?

12 A He broached the recovery of the goods.

13 Q You say "he." You are referring to  
14 Mr. Brach?

15 A Yes, Mr. Brach.

16 Q In what way did he broach the recovery  
17 of goods?

18 A Initially by the comment in my office  
19 that the load was intact; that it is still around and  
20 in Mr. Appleby's office, after again he had been given  
21 his rights, and we began to ask him what he had to  
22 say, he, I believe, took the initiative in mentioning  
23 to me, Mr. Appleby and Mr. Reilly that he could find --  
24 could locate the radios.

25 Q Just to get the timing of this -- there

1  
2 came a time when he asked to see Mr. Puccio.

3 Mr. Appleby went out and came back and  
4 advised him if he wanted to make a statement he would  
5 have to make it to Mr. Appleby?

6 A As best I remember, yes.

7 Q Did that colloquy take place before any  
8 discussion about the facts of this --

9 A Yes. I believe Mr. Appleby at the be-  
10 ginning or very close to the beginning apparently con-  
11 sulted with Mr. Puccio and I believe the interview  
12 started from scratch after.

13 Q Did Mr. Appleby, after returning from  
14 Mr. Puccio, discuss in any way what the position of  
15 the Government would be with respect to Mr. Brach's  
16 statement?

17 A No.

18 Q Is it your testimony that Mr. Brach just  
19 began volunteering a statement?

20 Is that your testimony?

21 THE COURT: Well, did I understand you to  
22 say that you conveyed to Mr. Brach the inquiries  
23 that his stepfather or his brothers had made  
24 with respect to the whereabouts of the load?

25 THE WITNESS: In my office -- in answer



1  
2 to the gentleman's question -- was there any  
3 conversation whatever relative to this case,  
4 I answered, "Yes," and I answered that I had  
5 on numerous occasions discussed the matter with  
6 the Frieds concerning where the merchandise was.

7 THE COURT: You told that to Brach?

8 THE WITNESS: Yes, I did.

9 THE COURT: Was that the time he said  
10 that the load is intact and still around, or did  
11 he say that before?

12 THE WITNESS: Would you like me, your  
13 Honor, to go -- I had men oned to Mr. Brach  
14 that his stepfather told me something to  
15 the effect that he wasn't insured entirely  
16 on the load.

17 I can't remember the details.

18 THE COURT: When? I am interested in the  
19 time.

20 THE WITNESS: In my office.

21 THE COURT: Well, he said the load was in-  
22 tact --

23 THE WITNESS: This is before he said it  
24 was intact. This was before he said that.  
25

1  
2 THE COURT: After you had told him that  
3 his stepfather and brothers were interested in  
4 where the load was --

5 THE WITNESS: Yes, they sure were --

6 THE COURT: And you told him the step-  
7 father said it was uninsured --

8 THE COURT: Party uninsured.

9 THE COURT: -- then he said the load is  
10 intact, still around?

11 THE WITNESS: Right.

12 THE COURT: From then on he didn't say  
13 anything until you brought him back to this  
14 Courthouse and Mr. Appleby came in and then the  
15 discussion was he knew.

16 Is that in substance the story, without  
17 going through all this and that?

18 THE WITNESS: In substance that's what hap-  
19 pened.

20 BY MR. YOUTT:

21 Q I believe you testified that Mr. Brach  
22 asked, "What's in it for me? Do I get immunity," or  
23 words to that effect?

24 A Words to that effect.

25 THE COURT: That's before he said anything



1  
2 to Appleby; right.

3 THE WITNESS: No, after we began inter-  
4 viewing Mr. Brach.

5 THE COURT: But it was still before he  
6 said anything to Mr. Appleby before he made state-  
7 ments?

8 THE WITNESS: Absolutely.

9 THE COURT: So all you have before that  
10 is, "The load's intact. It's still around."

11 Then you see Mr. Appleby and he doesn't  
12 make any statements of any substance except he  
13 now says, "What's in it for me"; is that right?

14 THE WITNESS: That's right.

15 THE COURT: And what else does he say?

16 He said, "What's in it for me?"

17 That's a long story just to get this --  
18 oh, you told him you had a good case before he  
19 said that; right?

20 THE WITNESS: Right.

21 THE COURT: And he said he wanted to make  
22 a statement and Mr. Appleby is supposed to have  
23 said: No, no; emphatically, no.

24 He said if he cooperated all the state-  
25 ments he made would be brought to the Judge's attention.

1  
2 That's about all; is that right?

3 THE WITNESS: That's right.

4 BY MR. YOUTT:

5 Q Was anything else said by Mr. Appleby  
6 or by you or by anyone else other than Mr. Brach prior  
7 to the time Mr. Brach began relating his story?

8 A No.

9 Q There was no -- that was the entire answer,  
10 was it, to Mr. Brach's question, "What's in it for me"?

11 A After we settled down in Mr. Appleby's  
12 office and were about to see in what direction,  
13 whatever interview was going to proceed, Mr. Brach  
14 said in effect, "If I cooperate and if I find for you  
15 where the radios are" -- "what for" -- "what happens?"

16 THE COURT: Did he use the word "immunity"?

17 THE WITNESS: I don't recall. I think he  
18 used the word "immunity."

19 I can't recall if he used it. It was  
20 brought to my attention in a pre-trial conference  
21 that he had said, "Could I be granted immunity?"

22 I don't remember that but it's possible  
23 he could have said that.

24 THE COURT: All right.  
25



1  
2 BY MR. YOUTT:

3 Q At that point or any time during that  
4 afternoon, was anything said by Mr. Appleby or anyone  
5 on behalf of the Government, about the Government's  
6 interest in prosecuting the recipients of the goods,  
7 Mr. Mancini or his relatives?

8 A No.

9 Q Nothing at all was said by Customs agents  
10 or Mr. Appleby about that area?

11 A No, not to Mr. Brach, no.

12 Q You testified, I believe, that Mr. Appleby  
13 began preparing complaints against the other individ-  
14 uals; is that correct?

15 A He and I, yes, began preparing the complaints.

16 Q Did you, agent, prepare an affidavit in  
17 support of the complaint?

18 A Yes.

19 Q I see. And in that affidavit, did you  
20 relate the information provided to you by Mr. Brach?

21 A Yes.

22 Q At that time, did you discuss with Mr. Brach  
23 the necessitating of calling him as a witness or the  
24 desire on the part of the Government to call him as a  
25 witness should the Mancini matter materialize into a

1  
2 criminal prosecution?

3 A At that time -- I would say, no, not at  
4 that time.

5 Q Did the thought enter your mind at that  
6 time --

7 THE COURT: I am not interested in the  
8 thoughts that entered his mind.

9 Q Did there come a time some time on  
10 April 21st, the first that Mr. Brach was in custody,  
11 that you or anyone in your presence had a conversation  
12 with Mr. Brach about his testifying as a witness in  
13 what I'll refer to as the Mancini case?

14 A Yes.

15 Q When was that?

16 A Probably at the time that Mr. Brach pro-  
17 ceeded to explain in detail what had previously tran-  
18 spired.

19 Q Would that be before or after the time  
20 you prepared your affidavit in the criminal case against  
21 Mr. Mancini?

22 A I would say synonymous -- you mean when  
23 I spoke with Mr. Brach about the feasibility of his  
24 offering to testify?

25 Q Yes.



1  
2 A At that time we didn't go into any detail  
3 as to what, if any, testimony would be necessary on the  
4 part of Mr. Brach.

5 THE COURT: You just said you talked to  
6 him about testifying in the Mancini case and now  
7 you say no.

8 THE WITNESS: Maybe I got the question  
9 wrong.

10 I thought I was asked when had I realized  
11 that it eventually -- that this bridge would  
12 have to be crossed and I realized it pretty  
13 quickly.

14 BY MR. YOUTT:

15 Q My question is, when did you discuss it  
16 with Mr. Brach?

17 A I would say after the preparation of the  
18 complaint.

19 As best I can recall that wasn't a matter  
20 in Mr. Brach's apparent mind of terrible concern then.  
21 Later it did concern him.

22 Q This was while you were still in Mr. Appleby's  
23 office on that first occasion?

24 A Yes.

25 Q What was said by you or anyone else on

1  
2 behalf of the Government with respect to Mr. Brach's  
3 contemplated testimony in the Mancini case on that  
4 occasion?

5 A I didn't tell Mr. Brach, as best I can  
6 recall, anything that he would have -- what and to what  
7 extent he would have to cooperate -- this is in  
8 Mr. Appleby's office.

9 Q Did you ask him if he would cooperate?

10 A Not I specifically.

11 Q Did someone in your presence ask that?

12 A That would have to be asked.

13 Q Who?

14 A Mr. Appleby.

15 Q Can you recall what Mr. Appleby said?

16 A No.

17 Q Do you have any recollection as to anything  
18 Mr. Appleby said about that subject matter?

19 A I can imagine --

20 THE COURT: No, no.

21 THE WITNESS: The answer is: No.

22 Q You do know it was discussed?

23 A Briefly, yes.

24 Q After you left Mr. Appleby's office ac-  
25 companying Mr. Brach, did you or Agent Reilly have



1  
2 any discussions with Mr. Brach about that subject,  
3 the subject of his testimony in the Mancini case?

4 A About his testimony, no.

5 Q About whether or not he would be called  
6 upon to testify.

7 A (No response.)

8 THE COURT: Are we waiting for something?

9 Do you want to press the question again?

10 Q Did you discuss in any way, not the  
11 specifics of his testimony, but did you discuss -- and  
12 by discussing, I mean whether he would be interested  
13 in testifying or what testifying would entail?

14 A Yes.

15 Q What was said by whom in connection with  
16 that subject?

17 A By me to Mr. Brach and I asked him how  
18 well he knew Mr. Mancini, Mr. Rosario, Graco, Paperwik;  
19 if he were to be called upon to testify would he --  
20 would this upset him; would he be worried; did he feel  
21 anyone would make an attempt to harm him or do something  
22 to him.

23 He said that in effect, that in effect,  
24 while the thought entered his mind, he wasn't very  
25 worried about it but it was a possibility.

O'Neill - cross - Youtt

62

1  
2 Q Did you discuss with Mr. Brach anything  
3 that could be done on his behalf in connection with  
4 his concern?

5 A I wouldn't discuss with him anything along  
6 that line because I'm not terribly aware of just how  
7 far and in what direction the Government goes.

8 THE COURT: The answer is: No?

9 THE WITNESS: No.

10 Q Did you tell him you would do anything  
11 in connection with his concern?

12 A No.

13 Q Isn't it a fact, the information put into  
14 the arrest warrants your department ultimately served  
15 on Mr. Mancini, Greco, Rosario and others -- is it a  
16 fact that information came from Mr. Brach?

17 A Yes.

18 Q Is it a fact the information that went  
19 into the search warrant came from Mr. Brach?

20 A Yes.

21 Q The search warrant is the legal device  
22 which was used to get into the truck and recover the  
23 items that you recovered; correct?

24 A Correct.

25 Q Now, in connection with the waiver --



1  
2 I believe it's Exhibit 2-- the first waiver that  
3 Mr. Brack signed -- the waiver of a speedy arraignment --  
4 do you recall exactly what he was told about the  
5 significance of signing that waiver?

6 A No.

7 Q Do you recall whether -- I believe you  
8 said that he originally indicated that he didn't want  
9 to be speedily arraigned or something to that effect;  
10 correct?

11 A Yes.

12 Q And he was told at some point that he  
13 should sign that waiver but you do recall what he was  
14 told?

15 A Yes.

16 Q You recall seeing him sign the waiver?

17 A Yes.

18 Q Do you know whether or not he chose the  
19 wording of that waiver or someone else?

20 A It was more Mr. Appleby who chose the  
21 wording, the specific wording.

22 Q Was the waiver read to him out loud or  
23 did he read it to himself, to your recollection?

24 A Both, I would say.

25 Q Did he in any way discuss the wording of

1  
2 the waiver?

3 A No.

4 Q Is it not a fact that he was told he must  
5 sign that in order to continue his assistance of Customs  
6 and the Government in this particular matter?

7 A No.

8 Q Now, on the second day, there was a second  
9 waiver that was signed; correct?

10 A Correct.

11 Q Would you tell me to the best of your  
12 recollection what was discussed with Mr. Brach about the  
13 signing of that second waiver?

14 I believe that's Exhibit 3.

15 A Yes. It was about three or 3:30 and  
16 we were about an hour and a half from Eastern District.  
17 It became very apparent that should we attempt to get  
18 a search warrant and serve it that we weren't going to  
19 come close to getting back here in time for an arraignment.

20 The management would leave, I felt,  
21 6:00 o'clock at the latest. If we were to go through  
22 with securing a search warrant and securing the arrest,  
23 Mr. Brach wouldn't be able to be arraigned and Mr. Appleby  
24 made a point of telling us throughout the day that it  
25 is important to get Mr. Brach back in time for an arraign-



1  
2 ment.

3 When it became apparent --

4 Q My question was originally:

5 What you said to Mr. Brach?

6 You related what was going on in your mind.

7 Did you say this to Mr. Brach?

8 A "If we obtained a search warrant, you wouldn't  
9 be arraigned this evening," and again, "Would you waive  
10 your right to a speedy arraignment?"

11 Q Did Mr. Brach ask any questions about that?

12 A No, he was extraordinarily cooperative  
13 and said absolutely he would sign another waiver.

14 Q During all the time you were in the company  
15 of Mr. Brach in this search through New Jersey for the  
16 stolen goods, did you have any discussion with Mr. Brach  
17 about the subject of his cooperation in this matter, and  
18 how it might affect the case?

19 A No.

20 Q None whatsoever; is that your testimony?

21 A I would testify, none.

22 Q Did Mr. Brach ask any questions about  
23 that particular subject?

24 A No.

25 Q The next day which is now April 23rd, is  
that correct, the day of the arraignment?

O'Neill - cross - Youtt

66

A The day of the arraignment; right.

Q Two days after his arrest?

A Correct.

Q During that time, did Mr. Brach ask for  
an attorney or ask to consult an attorney in your presence?

A No.

Q And he was continuously in custody during  
that period, either your custody or the various jails  
where you left him off?

A Yes. He specifically -- he was asked on  
numerous occasions if he wanted an attorney and he  
emphatically stated that he did not want an attorney.

Q At the arraignment, were you present in  
the room -- by the arraignment, I mean the proceedings  
before the Magistrate, the first proceedings before  
Magistrate Schiffman, were you present in the room at  
all times during the arraignment?

A Not at all times, no.

Q Did you physically bring Mr. Brach to the  
location of the arraignment?

A No. Somebody else did.

Q When you arrived, was it before or after  
the proceedings had commenced?

A Just before.



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Q Were you present at the time bail was set?

A Yes.

Q Had anything been said prior to that time by you or anyone in your presence to Mr. Brach about the subject of bail?

A I wasn't in the building that day.

If I was in the building, it was on an unrelated matter.

Not by me or anyone in my presence.

Q Would you characterize Mr. Brach's attitude and mood prior to this date?

I think you said extraordinarily cooperative.

Did that mood continue on the date of his arraignment or at the time of his arraignment?

A After the arraignment he was annoyed.

Q Do you know what he was annoyed about?

A What he considered to be excessive bail.

Q As far as you were concerned, that's all he was annoyed about?

A Yes.

Q Nothing else to your knowledge?

A No.

MR. YOUTT: Nothing further.

REDIRECT EXAMINATION

BY MR. APPLEBY:

Q Agent O'Neill, to your knowledge, was this the first time Simon Brach was arraigned in any Court?

A No.

Q He's been arraigned on many occasions?

A As far as I know.

Q And he's had many lawyers represent him during the course of his life?

A Yes.

Q When I talked to you on the phone the second day you were looking for the goods, did I give you any instructions as to what promises should or should not be made to Mr. Brach?

A You were emphatic no promises should be made.

Q Did I tell you to make sure you told other agents that?

A Many times.

MR. APPLEBY: No further questions.

THE COURT: The question is: Did you make any promises?

THE WITNESS: I made no promises, no.

MR. YOUTT: No further questions.

THE COURT: Thank you very much.



(Witness excused.)

MR. APPLEBY: I was going to call -- I was considering calling --

THE COURT: Yourself?

MR. APPLEBY: No. Mr. Lombardo.

I can make an offer of proof with respect to what he'll testify to but he's on trial in a murder trial.

THE COURT: We're not going to extend this until Mr. Lombardo gets through with his trial.

MR. APPEEBY: If it's necessary, after Mr. Brach testifies, I can --

THE COURT: Is Mr. Brach going to testify?

MR. YOUTT: Yes, your Honor.

THE COURT: Well, maybe you can call Lombardo now and bring Mr. Brach on the stand and while Lombardo is coming over, we can hear Mr. Brach.

Is that possible?

MR. APPLEBY: I have Judge Brownstein's chambers number in my folder and perhaps your clerk could call and perhaps the judge would allow Mr. Lombardo to come down.

THE COURT: Why don't you do it?

1 MR. APPLEBY: Fine, your Honor.

70

2 THE COURT: Why don't you take care of  
3 your witnesses. I will take a five-minute recess  
4 so you can make a phone call.

5 (Recess taken.)

6 (After recess.)

7 MR. APPLEBY: Your Honor, I have a message  
8 that Mr. Lombardo is coming right over. He's in  
9 Brooklyn Supreme Court.

10 THE COURT: Do you want to hear Mr. Brach  
11 or Mr. Lombardo first?

12 MR. APPLEBY: It would take a little while --

13 MS. SELTZER: Your Honor, with your per-  
14 mission, may Mr. Asen take over for me? I am  
15 going upstairs to Judge Judd.

16 THE COURT: That's fine.

17 MR. APPLEBY: It will take a little time  
18 for Mr. Lombardo to get over here.

19 THE COURT: All right.

20 Mr. Brach, take the stand.

21  
22 (Continued on next page.)  
23  
24  
25



Brach - direct

71

S I M O N        B R A C H ,        called as a witness,  
having been first duly sworn by the Clerk  
of the Court, testified as follows:

THE CLERK: State your name and spell  
it for the record, please.

THE WITNESS: My name is Simon Brach.

DIRECT EXAMINATION

BY MR. YOUTT:

Q        Mr. Brach, how old are you?

A        Twenty-seven.

Q        Did you go to school-- what schools did  
you go to?

A        I went to a parochial school up til 12 years.  
I was in the States, and then for two years I went to  
Israel -- up to 14 years I was in Brooklyn. I went two  
years in Israel and then another year in the parochial  
school.

Q        You mean 14 years of age?

A        Yes.

Q        Did you graduate from high school?

A        No.

Q        Did you or did the parochial school you  
attended, did they teach you in English or another language?

A        We had Jewish class until 3:00 or 4:00

Brach - direct

72

o'clock and then two and a half hours of English.

Q The Jewish classes were taught in another language other than English?

A Correct.

Q How much English study have you had in your life?

A Middle of eighth, I stopped.

Q Middle of the eighth grade.

Do you speak English at home?

A No.

Q What language do you speak?

A Jewish -- Yiddish.

THE COURT: Is this relevant?

MR. YOUTT: As to what Mr. Brach understood at the time he made the statements he made.

The fact that Mr. Brach isn't a native-tongued American --

THE COURT: Well, he's -- as a matter of fact, he speaks and understands English very well. He was here before me a couple of times.

MR. YOUTT: I don't think he understands English as well as I do and I think his education reveals that.



Brach - direct

73

BY MR. YOUTT:

Q Mr. Brach, I believe that you have heard testimony today about circumstances concerning your arrest in a case now about to begin trial; is that correct?

A Yes.

Q Were you indeed arrested on or about April 21, 1975?

A Yes.

Q Did you recognize Agent O'Neill as being one of the agents that arrested you?

A Yes.

Q Was that at the Brooklyn Supreme Court building?

A 120 Schermerhorn Street.

Q You were arrested at that time.

Do you recall having been advised of your rights?

A No.

Q Do you recall at any time during that day being advised of your constitutional rights?

A Later on when I was brought to downtown Manhattan.

THE COURT: World Trade building?

Brach - direct

74

THE WITNESS: World Trade building.

BY MR. YOUTT:

Q You understand what I mean by rights -- your constitutional right to remain silent, not be a witness or testify against yourself, and the right to have a lawyer present at any proceedings that may be had against you?

A Yes.

Q Are those the rights you are referring to?

THE COURT: Did you see him read from a card at any time?

THE WITNESS: When we got to the World Trade Center, he said, "We'll advise you of your rights."

In the room he pulled out the rights and I said, "It's okay. I know what you're going to read."

BY MR. YOUTT:

Q You knew that from prior experience, did you?

A Well, you know --

Q Isn't it a fact you have been convicted of a crime before, have you not?

A Correct.



Brach - direct

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Q And at that time you were advised of your rights also?

A Right.

Q On the basis of that experience, you thought you understood your rights?

A Correct.

Q Now, at that time when you were at the World Trade Center, did you have a discussion with Agent O'Neill or anybody concerning the facts of the case?

A He wanted to know very badly where the goods were --

Q Let me interrupt you.  
Tell me what he said in connection with the question, "Where is the good-?"

A When we were sitting in the car in Brooklyn, he said, "You are arrested for stealing a truck."

I said, "How can you arrest me? It's mine."  
He said, "You brothers are pressing charges."  
He showed me a warrant. He said, "Where is the goods?"

I didn't answer that question.

Q Where were you when he asked you that?

1 A In the car where he took me to the World  
2 Trade Center.

3 I didn't answer him nothing. When we went  
4 to Manhattan, he asked, "Where's the goods?"

5 I said, "The goods are mine. How can you  
6 charge me with stealing the goods?"

7 He said, "Your brothers pressing charges."

8 I said, "I have problems with my brothers.  
9 They threw me out of the business. I have a right to  
10 them"

11 He said, "Tell me where the goods are or  
12 we're going to arrest you."

13 Q Talk slowly.

14 A He asked what I did with the goods. I  
15 didn't answer him on the question.

16 At that point he said, "We could do some-  
17 thing. Tell us where the goods are."

18 Q Did he say anything about what he could  
19 do?

20 A At this point I said, "I don't trust you.  
21 If you bring me in front of Puccio, maybe we can go further."

22 Q Do you know who Puccio is?

23 A He prosecuted me in my first case.

24 Q Do you know Mr. Puccio as an assistant U. S.  
25



attorney?

A Correct. Then we went to Mr. Appleby and they asked what I know, whether I can make recovery.

I told them, "I think I know where the goods are but if I prove where the goods are, what's for me?"

He said, "We ain't going to prosecute you."

Q Who said that?

A Mr. Appleby.

Q To the best of your recollection, what words do you recall him using?

A That's one of the words he used and in between -- I asked what kind of protection would I have.

He said, "Don't worry. We'll put you in a hotel," and they put me in a jail and said, "We couldn't make arrangements for the hotel."

Q Did you see Mr. Puccio at all?

A No. He said it's between us.

Q Tell me everything that was said with respect to what would happen if you cooperated?

A They wanted to find out how sure I am that I know where the goods are so I told them an incident that happened and I was almost sure the goods were there.

Q Is that before or after anything was said

Brach - direct

78

1  
2 about cooperation?

3 A At this point they told me -- the understanding  
4 was that if I could prove the goods were there, they  
5 wouldn't prosecute me and I would testify against these  
6 individuals I sold the goods to.

7 MR. APPLEBY: Would you read that back?

8 (Record read.)

9 Q Mr. Brach would you speak slowly so that we  
10 can pick up every word you answer; so that Mr. Appleby  
11 can hear you and the reporter can get everything down.

12 Now, was anything -- well, what was said by  
13 whom about the question of you testifying against other  
14 people?

15 A At this point -- you know -- first I told  
16 them the substance -- how I know that most probably the  
17 goods are there.

18 I told them the substance. I was down to  
19 pick up money and my understanding, the goods was still  
20 in the truck.

21 He told me it looks pretty good.

22 Q Who told you that?

23 A Mr. Appleby and Mr. On'Neill was in the of-  
24 fice at the same time.

25 Q Do you know what he was referring to?



1  
2 A Yes, that probably the goods were still  
3 there.

4 Q What else was said?

5 A Now, he went down to get a warrant. He  
6 wanted the names whom I sold the goods to.

7 So I gave him the names of whom I sold the  
8 goods to. He went downstairs and came upstairs. He  
9 said, "In order for you to show us where the goods are,  
10 you have to sign me this paper."

11 Q Who said this?

12 A Mr. Appleby.

13 Q What else did he say about the paper?

14 A "This way you can show us where the goods  
15 are and if we find it, we won't prosecute you."

16 Q Was that the first time he said, "We're not  
17 going to prosecute," or was there a time before?

18 A When I said, I am almost sure where the  
19 goods were."

20 Q I want you to think and remember to the  
21 best of your recollection exactly what that is that  
22 Mr. Appleby thought. Then I will ask you what you  
23 thought that meant -- what Mr. Appleby said, I'm sorry.

24 What did Mr. Appleby say exactly?

25 A He said, "If we're going to find the goods,

Brach - direct

1  
2 we ain't going to prosecute you and you're going to  
3 testify against these other individuals."

4 Q What did you understand him to mean about that?  
5 Did you understand it to mean you had to  
6 testify?

7 A He meant to say if you find the goods,  
8 he'll put me in a hotel and I will testify in the Grand  
9 Jury and all this and he'll let me go.

10 Q Now, when you signed --

11 THE COURT: Can you wait, Mr. Lombardo, for  
12 a while?

13 MR. LOMBARDO: Yes, your Honor.

14 MR. YOU'RE: I have no objection to interrupt-  
15 ing --

16 THE COURT: No. It depends on how long  
17 this is going to be. We'll wait until you finish  
18 your side and then maybe we can interrupt  
19 before the cross and let Mr. Lombardo get on the  
20 stand.

21 Q Mr. Brach, I am handing you what has been  
22 marked for identification, Government Exhibit 2.

23 Do you recognize that as having been a state-  
24 ment that you signed?

25 A I signed this paper.



Q Do you recall who it was that prepared this paper?

A Mr. Appleby went into his secretary's office and told her to type out and he told me to sign it.

Q Why did you sign it, what reason?

A This is the only way to take me out and show him where the goods are.

Q Is that what Mr. Appleby told you?

A Right.

Q Did you read that statement before you signed it?

A He handed it to me. I went through it fast and signed it.

Q Did you pay attention to what it said?

A Not really.

Q Now, again, when he was talking about your helping him, why were you going to help him?

A Because he wasn't going to prosecute me.

Q Was there any other reason you agreed to help or assist the Government in this case?

A Because Mr. O'Neill, the Customs agent, was so desperate to find where the goods was -- if we could find where the goods were, we could put up in a

Brach - direct

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2 hotel and I told him about my child and I was frightened  
3 these people would hurt me.

4 "Don't worry. You will be safe."

5 MR. APPLEBY: When was that statement  
6 made?

7 THE WITNESS: In the car going out to  
8 Jersey. And there was another agent present, too.  
9 He put me in West Street.

10 I said, "Why," and he said he couldn't  
11 make arrangements for a hotel.

12 BY MR. YOUTT:

13 Q I believe you heard Agent O'Neill testify  
14 that you gave a statement as to how the goods were ob-  
15 tained?

16 A Because he told me he wouldn't prosecute  
17 me.

18 Q So you made a statement concerning the cir-  
19 cumstances of your getting the goods?

20 A Yes.

21 Q What reason again was it that you made that  
22 statement?

23 A Because they would protect me, put me up  
24 in a hotel and so on, and wouldn't prosecute me.

25 Q Did anyone tell you that other than Mr. Appleby?



Brach - direct

83

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2 A Agent O'Neill, another agent with him;  
3 we were driving out to Jersey. We stopped in a restaurant.  
4 We went to eat -- never handcuffed me.

5 He said, "We'll put you up in a hotel."

6 I said, "I'm sorry -- can't find the place."

7 He said, "We'll try tomorrow."

8 He was going to let me go home and then  
9 he called Appleby and it was my understanding that between  
10 Appleby and O'Neill, they couldn't put me in a hotel,  
11 couldn't let me go home.

12 So they put me in a jail.

13 THE COURT: Now, you say that Appelby  
14 and O'Neill told you they wouldn't prosecute  
15 you if you would tell them where to find the  
16 merchandise?

17 THE WITNESS: Right.

18 BY MR. YOUTT:

19 Q You thought you were to be put up in a  
20 hotel?

21 A Correct.

22 Q When did you first learn the hotel would  
23 be the West Street Federal Detention Center?

24 A It was late at night and I couldn't find  
25 the place I thought I would find with Agent O'Neill.

Beach - direct

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2 We were driving into the city. The other  
3 agent with him said, "We'll drop him off home."

4 Q Who?

5 A The other agent with Agent O'Neill.

6 They were talking about dropping me off  
7 home. Then I think they called up Mr. Appleby and de-  
8 cided to put me into West Street.

9 So I asked and they said they couldn't  
10 make arrangements for a hotel and said, "You can stay  
11 there for the night."

12 Q Did they tell you why they wouldn't drop  
13 you off at home?

14 A To make sure I would be here.

15 Q To have you available?

16 A Yes.

17 Q So the next day you went again?

18 A Correct.

19 Q Did there come a time when they asked you  
20 again to sign a waiver form?

21 A After we found the place that I recognized  
22 -- I memorized the house and the truck outside -- so  
23 everything was beautiful.

24 They said, "It's too late to make it to  
25 Brooklyn. Why don't you sign this?"



Brach - direct

85

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Q You recognize Exhibit 3 for Identification?

A They wrote it up in the car and told me  
to sign it.

Q Who wrote it up?

A Mr. O'Neill.

Q He said he wanted you to sign it because  
it was too late to get back to Brooklyn?

A Yes.

Q Was anything said at that time about an  
arraignment?

A No.

Q Did you understand what an arraignment was?

A If I understand what an arraignment was?

Q At that time?

A No.

THE COURT: Weren't you arraigned before?

THE WITNESS: No.

MR. APPLEBY: It was Brooklyn Supreme Court  
where the agent arrested him.

THE COURT: No, no. In other cases.

Weren't you arraigned before me?

Q In the earlier case were you brought before  
a magistrate to start the case going?

A In this case?

Brach - direct

86

1  
2 Q No.

3 THE COURT: You know what an arraignment  
4 is?

5 THE WITNESS: Yes.

6 Q Do you understand arraignment to be before  
7 a magistrate --

8 THE COURT: He says he knows.

9 MR. YOUTT: It took me a while to learn  
10 the difference between an arraignment and an  
11 arraignment on an indictment.

12 I wonder if he still has the same confusion  
13 I had.

14 MR. APPLEBY: Objection.

15 THE COURT: He's talking about whether or  
16 not there was promises made for his cooperation.

17 What is the emphasis about the arraignment?

18 MR. YOUTT: What Mr. Brach knew to be a  
19 criminal prosecution and the significance of his  
20 not being arraigned.

21 THE COURT: Even so, he could still be  
22 arraigned, could he not, and the prosecution  
23 dropped?

24 MR. YOUTT: That's true.

25 THE COURT: I don't get the relevance of



1  
2 an arraignment.

3 But, of course, you see, another thing,  
4 if promises were made before the arraignment,  
5 which he says they were, the arraignment has no  
6 significance anyway, does it?

7 MR. YOUTT: I believe the behavior before  
8 the arraignment would corroborate a theory by  
9 which Mr. Brach understood that he won't be --

10 THE COURT: I think it would be the contrary.

11 I mean, I think it is confusing. If  
12 they made a promise and broke it, that's it --  
13 period.

14 MR. YOUTT: Yes, but consistent with the  
15 Government's theory with no promises --

16 THE COURT: That's a hundred per cent  
17 right, too. You are corroborating the Government's  
18 theory -- they made no such promises and that's  
19 why they had to have the arraignment.

20 MR. YOUTT: If the arraignment was the  
21 first day --

22 THE COURT: No. Well, anyway, you have  
23 now a conflict of testimony.

24 MR. YOUTT: Yes.

25 THE COURT: Any further statements you want

1  
2 to ask him?

3 BY MR. YOUTT:

4 Q You signed the second waiver of arraignment,  
5 Mr. Brach on the representation of the agent, that that's  
6 what was necessary?

7 A Yes.

8 Q Because you couldn't get back to Court;  
9 correct?

10 A Yes.

11 Q Where did you spend your second night?

12 A Hackensack, in the county jail --

13 THE COURT: Hackensack?

14 THE WITNESS: In some jail.

15 Q Did they discuss why they were taking you  
16 to a jail that night?

17 A Same reason -- can't make no arrangement  
18 for a hotel.

19 Q Was there a discussion about talking you  
20 back to West Street?

21 A They wouldn't take me to West Street  
22 because the people arrested in the same case were held  
23 over night in West Street.

24 THE COURT: Didn't have the Metropolitan  
25 Correctional Center available at that time. It



Brach - direct

was West Street?

MR. YOUTT: Yes.

Q Was there any discussion at all at that time prior to your arraignment about how your cooperation with the Government would help you?

A At that point they -- after I had this signed they waited for a warrant from New York.

They made a search warrant of the place and then some other agent decided to take me to Jersey, some other Custom agent.

Q Did anyone talk to you about testifying in the Grand Jury?

A This happened the following day when I was arraigned, the magistrate was going to release me without bail.

Mr. Appleby jumped up and said: No.

Magistrate Schiffman signed the warrants and knew what was happening downstairs. He was to let me go on my recognizance and Mr. Appleby said: No, you need bail, and asked for bail. So they set bail at \$25,000.

THE COURT: All right. What's the next question?

MR. YOUTT: I don't think he answered

1  
2 the last question.

3 BY MR. YOUTT:

4 Q Was there any discussion about testifying  
5 in the Grand Jury at any time by anyone?

6 A I was brought a few days later to Mr. Appleby's  
7 office.

8 Q At the arraignment was there any discussion  
9 about testifying before the Grand Jury?

10 A At the arraignment, he was afraid if  
11 I got away without bail, I wouldn't keep to my promise.

12 I told him I kept to my promise.

13 THE COURT: We get nowhere.

14 MR. YOUTT: I am trying.

15 THE COURT: Was there any discussion about  
16 your testimony at the arraignment?

17 THE WITNESS: No discussion about testify-  
18 ing.

19 THE COURT: Next question.

20 BY MR. YOUTT:

21 Q Mr. Brach, you heard Agent O'Neill testify  
22 that your attitude had changed from one of cooperation  
23 to one of being hostile at the time of arraignment.

24 A Yes.

25 Q Why did that happen?



Brach - direct

91

1  
2 A Magistrate Schiffman was going to let me  
3 go without bail because he knew I was cooperating and  
4 now Mr. Appleby wanted bail.

5 So I told Agent O'Neill, "What's going on  
6 with you?"

7 He said, "I'm sorry." Mr. Appleby --  
8 "This is the way it is. We can't do nothing.  
9 It's for your own protection. You need bail for  
10 your own protection."

11 So I couldn't make it and I was put to  
12 jail.

13 Q Is that when you became hostile?

14 A Correct.

15 Q Did you continue to cooperate after that?

16 A Nope.

17 Q What was the reason for not cooperating?

18 A I knew I was doublecrossed.

19 THE COURT: Now, we have that.

20 Q Several days later I believe there was a  
21 conference between yourself, Mr. Appleby and Mr. Lombardo?

22 A Correct.

23 Q Had Mr. Lombardo been appointed to represent  
24 you as an attorney?

25 A Yes.

1

2

Q Where did this conversation take place?

3

A In Mr. Appleby's office.

4

Q What was said?

5

A I was brought over. Mr. Appleby wanted

6

to put me in front of the Grand Jury. I told him,

7

"I am in jail now and my deal is I am not going to be

8

prosecuted. Are you going to step up to your deal?"

9

He said, "Listen, the Judge will give you

10

a good sentence. Plead to one count."

11

I said, "The deal was that I wouldn't

12

be prosecuted for no counts."

13

I told Mr. Lombardo the promise wasn't

14

like that. So Mr. Lombardo told me --

15

Q Was this conference in the presence of

16

Mr. Appleby?

17

A Right.

18

Q What did Mr. Lombardo say?

19

A "If you don't think they'll keep their part

20

of the deal, I don't think you should testify in the

21

Grand Jury and just hold on."

22

Q Mr. Brach, have you had any conferences

23

with Mr. Appleby before or after that you have not

24

testified to here?

25

A After I told him there is no deal because



Brach - direct

93

the deal was I am not going to be prosecuted --

Q When was this?

A In his office.

Q Several days after arraignment?

A Yes.

Mr. Lombardo advised me, "If you think you are being a fool, hold on."

Q Is there any conference we've not covered between Appleby and you?

A Not that I know of.

MR. YOUTT: No further questions.

THE COURT: Now, you want to wait?

Are you in a hurry, Mr. Lombardo, or can you wait for cross-examination to take place?

Which do you wish?

MR. LOBARDO: Whatever is most convenient for the Court.

THE COURT: How long are you going to take?

MR. APPLEBY: No questions on cross-examination.

THE COURT: You may step down, Mr. Brach.

Are you going to call Mr. Lombardo?

MR. APPLEBY: Yes, sir.

THE COURT: Mr. Lombardo, will you step up, please.

Lombardo - direct

J O S E P H J. L O M B A R D O , called as a  
witness, having been first duly sworn by the  
Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. APPLEBY:

Q What is your profession?

A Attorney.

Q How long?

A Since 1939.

Q Did there come a time when you represented  
Mr. Simon Brach at his arraignment on April 23, 1975,  
in the United States Courthouse in the magistrate's  
office?

A Yes.

Q Excuse me -- in the Courtroom.

And --

THE COURT: That was the 22nd or 23rd?

MR. APPLEBY: 23rd.

BY MR. APPLEBY:

Q Do you recall myself being there?

A Yer.

Q Do you recall Agent O'Neill being there,  
the gentleman right here with the green coat?

A Not really.



Lombardo - direct

95

1  
2 Q And do you recall your conversations with  
3 Mr. Brach at that time?

4 A Yes.

5 Q Is that the first time that you met Mr. Brach?

6 A Yes.

7 Q And do you recall my asking for \$25,000 bail?

8 A Yes.

9 Q Did you have any conversation on that  
10 day with respect to Mr. Brach complaining about the  
11 fact that he had been granted immunity by myself?

12 MR. YOUTT: With Mr. Brach -- I would object  
13 with the attorney-client privilege.

14 MR. APPLEBY: It's been waived.

15 MR. YOUTT: We didn't waive anything.

16 This was a conference only between Mr. Appleby  
17 and Mr. --

18 THE COURT: Was this conference made in  
19 your presence, Mr. Appleby?

20 MR. APPLEBY: My question, your Honor, was  
21 whether Mr. Brach at the time of his arraignment  
22 complained to Mr. Brach --

23 THE COURT: You mean complained to  
24 Mr. Lombardo.

25 MR. APPLEBY: Yes, I'm sorry -- about the  
fact that I broke any promises with respect to

1  
2 immunity.

3 MR. YOUTT: My objection goes to confer-  
4 ences between attorney and client as such.

5 THE COURT: I understand your objection  
6 perfectly.

7 Did Mr. Brach testify that Mr. Lombardo  
8 was there and made certain statements to him;  
9 is that right -- don't you remember that,  
10 Mr. Appleby?

11 MR. APPLEBY: Yes, sir.

12 MR. YOUTT: That was a later occasion.

13 THE COURT: Didn't he tell him, "Hold on.  
14 If they made a promise to you as to immunity,  
15 you better hold on"?

16 MR. APPLEBY: That's what I recall.

17 THE COURT: Sure. You may ask the questions.  
18 Your objection is overruled.

19 MR. YOUTT: If I may clarify one thing --  
20 the questions I asked Mr. Brach were as to a  
21 conference in Mr. Appleby's office several days  
22 later.

23 THE COURT: The door is opened.

24 MR. YOUTT: This was in the presence of  
25 Mr. Appleby.



Lombardo - direct

97

THE COURT: Now, wait a minute. He may be right. Ask him that question.

Mr. Lombardo was up in your office with Mr. Brach?

MR. APPLEBY: Correct, your Honor.

THE COURT: Now, Mr. Youtt says he asked Mr. Brach about what took place up there in your presence; is that right?

MR. APPLEBY: That's correct.

THE COURT: All right.

Now, as to that, I think he opened the door.

I don't think he opened the door as to anything else that may be open to question.

MR. APPLEBY: I respectfully disagree.

THE COURT: Let's see what he said up in your office first.

BY MR. APPLEBY:

Q Did you just hear Mr. Brach testify in the Courtroom, Mr. Lombardo?

Q Yes.

Q And you heard him testify with respect to a conference in my office several days after the arraignment, I believe the testimony was?

A That's correct.

1  
2 Q Did Mr. Brach at that time complain to you  
3 or to me about the fact that I had broken a promise  
4 of immunity to Mr. Brach?

5 A I don't recollect that.

6 Q Mr. Lombardo, is this the kind of question  
7 that you would remember, if it had come up?

8 A Yes.

9 THE COURT: You don't remember him protest-  
10 ing that the Government broke their promise of  
11 immunity?

12 THE WITNESS: No, your Honor.

13 THE COURT: All right.

14 MR. APPLEBY: Now, I'd like to direct  
15 Mr. Lombardo's attention to the arraignment itself.  
16 BY MR. APPLEBY:

17 Q You heard Mr. Brach make a statement that  
18 Magistrate Schiffman was aware of a promise of immunity  
19 granted by myself, by the Government?

20 A Yes.

21 Q In other words, that must have been stated  
22 in open Court for Magistrate Schiffman to be aware of  
23 that; isn't that correct?

24 A I would think so.

25 Q Was it ever brought to Magistrate Schiffman's



1  
2 attention that the Government, myself or anyone in the  
3 Government, had granted Mr. Brach immunity with respect  
4 to the case he was arraigned on?

5 A No.

6 THE COURT: Not in your presence anyway?

7 THE WITNESS: No, your Honor.

8 MR. APPLEBY: No further questions.

9 MR. YOUTT: I have no questions.

10 MR. APPLEBY: If you wish, I can call  
11 Peter Reilly.

12 THE COURT: No. I would prefer you get on  
13 the stand and make a statement as to whether or  
14 not you made any such promise.

15 MR. APPLEBY: I can take an oath.

16 THE COURT: No, you understand you are  
17 under oath. But you had better make a statement.

18 I ask you to take the stand in case Mr. Youtt  
19 wants to cross-examine you.

20  
21 (Continued on next page.)  
22  
23  
24  
25

1  
2 RICHARD APPLEBY, called as a  
3 witness, took the stand and testified as follows  
4 under oath:

5 THE COURT: You consider yourself under  
6 oath to tell the truth, the whole truth and  
7 nothing but the truth?

8 THE WITNESS: I do.

9 THE COURT: You heard the testimony of  
10 Mr. Brach with respect to his conference with you  
11 when brought to your offices by Mr. O'Neill and  
12 he says you promised him immunity from prosecu-  
13 tion and he would cooperate with you and show  
14 you where the load was.

15 Did you make any promise to him of immunity?

16 THE WITNESS: No, your Honor, I definitely  
17 did not.

18 As a matter of fact, I was a neophyte assist-  
19 ant at that time. It would have been completely  
20 ridiculous for me as a lowly assistant to say,  
21 "Mr. Brach, you have immunity."

22 THE COURT: Did he ask for immunity?

23 THE WITNESS: He did ask for immunity.

24 THE COURT: Did you go to anyone to find out  
25 if you could give him immunity?



Appleby

A 101<sub>101</sub>

THE WITNESS: No. He said he wanted to talk to Mr. Puccio and I thought if I brought Mr. Puccio into the conference, he would be more cooperative.

Mr. Puccio said, "This is your case. You talk to Mr. Brach."

In effect, he said, "I'm staying out of this case."

(Continued on next page.)

1 fols.

Appleby

1  
2 THE COURT: Did you ask him whether you should  
3 grant him immunity?

4 THE WITNESS: No.

5 THE COURT: Did you grant him immunity of any  
6 kind?

7 THE WITNESS: No.

8 THE COURT: Did you promise him any assistance  
9 of any kind if he cooperated?

10 THE WITNESS: I told him any cooperation he  
11 gave to the Government, would be made known to the  
12 sentencing Judge at the time of sentence. I wasn't  
13 about to enter any deals on how many counts he was  
14 to plead to.

15 THE COURT: Did you tell him if he testified  
16 you would grant him immunity?

17 THE WITNESS: No.

18 THE COURT: Did you discuss with him the  
19 problem of testifying against the Mancinis in their  
20 trial?

21 THE WITNESS: Yes, I believe I did. I told him  
22 there would probably be a case against Mancini and  
23 these other individuals where he would have to be a  
24 witness and he would eventually have to testify  
25 before the Grand Jury.



1  
2 THE COURT: He never testified before the  
3 Grand Jury, did he?

4 THE WITNESS: No. At the arraignment I asked  
5 for high bail because I wanted Mr. Brach to testify  
6 before the Grand Jury before we were considering to  
7 lower the bail. He was mad about the fact I asked  
8 for high bail <sup>but</sup> because he was a fugitive for a long  
9 while and I wanted to have him locked into his  
10 testimony and wasn't going to consider the question  
11 of lowering his bail until I was sure he was going  
12 all the way with the Government.

13 THE COURT: Did you tell him you were going  
14 to get him hotel accommodations?

15 THE WITNESS: No.

16 THE COURT: Do you want any questions?

17 MR. YOUTT: I have no questions, your Honor.

18 THE COURT: Thank you very much.

19 Gentlemen, this is simply a case of credibility.  
20 Whether I am going to believe Mr. Brach or whether  
21 I am going to believe Mr. O'Neill and Mr. Appleby  
22 and Mr. Lombardo and frankly, I am going to believe  
23 Mr. Appleby, Mr. O'Neill and Mr. Lombardo.

24 Consequently, I find there has been no problems  
25 of immunity in order to obtain Mr. Brach's cooperation

1  
2 and I am going, naturally, to dismiss the motion to  
3 suppress and permit any such statements made by  
4 Brach in this connection, admitted into evidence.

5 MS. SELTZER: I move pursuant to Rule 14 of the  
6 Federal Rules for severance of my client in view of  
7 that ruling. I don't see how it is possible to  
8 redact portions of that statement so as not to  
9 prejudice my client.

10 THE COURT: I don't know about that. I would  
11 have to wait and see what Mr. Appleby's suggestions  
12 would be as to how it could be redacted. Mr. Brach  
13 is going to testify.

14 MR. YOUTT: He is not going to testify.

15 THE COURT: I mean he is not going to testify.  
16 Then the testimony would only be by Mr. O'Neill as  
17 to the statements made by Mr. Brach.

18 MR. APPLEBY: Correct.

19 THE COURT: So, I would have to see what they  
20 are going to excise. I can't sit here and say  
21 under any circumstances could proper --

22 MR. YOUTT: I would like to join in the motion,  
23 if a redaction is made to satisfy Mrs. Seltzer, I  
24 believe it is going to severely hamper my opportunity  
25 to cross-examine the agent concerning the matter of



1  
2 the statement.

3 THE COURT: I can't see that. I have to see  
4 the redaction. Under your theory there wouldn't be  
5 any possibility to have any redaction.

6 MR. YOUTT: If I cross-examine the agent on  
7 the case report --

8 THE COURT: I haven't seen it and I have got  
9 to see what the redaction is going to be.

10 MR. YOUTT: Perhaps we can have a hearing on  
11 that?

12 THE COURT: I won't have any hearing on this  
13 little case.

14 MS. SELTZER: At what point will it be  
15 determined?

16 THE COURT: I suppose you can do this, you  
17 can work with Mr. Appleby and Mr. O'Neill and see  
18 what their redaction is going to be and then I think  
19 that could be submitted to me at a status report.  
20 We are not going to pick any jury tonight.

21 MR. YOUTT: If we are in a position where a  
22 redacted statement comes out that Mr. Brach was the  
23 only person --

24 THE COURT: It can't be so.

25 MR. YOUTT: It would have to be, it wouldn't

1 take anything much to figure out who it is.

2 MR. APPLEBY: I have gone over this with  
3 Agent O'Neill and we have worked out a manner that  
4 would be acceptable. The oral statement has been  
5 reduced to a written statement. I can simply make  
6 a copy of that, cross out the parts in a felt pen so  
7 you can see beneath it to indicate what Agent O'Neill  
8 would not testify to.

9 MR. YOUTT: On cross-examination I wouldn't  
10 be limited on that --

11 THE COURT: You will be limited on cross-  
12 examination as to what the agent said on direct  
13 examination.

14 MR. YOUTT: Rule 106 provides if a statement  
15 is introduced into evidence or utilized, any other  
16 party may utilize any part of that statement made in  
17 the case.

18 THE COURT: I understand if there is going to  
19 be any statement made as to Mr. Bikel -- you better  
20 give it to me immediately. Give me the redacted  
21 statement, we will have a hearing tomorrow morning.  
22 Then we will pick the jury later. 10:00 o'clock  
23 tomorrow morning.

24 \*\*\*  
25



I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Gerald O'Neill	5	42	68	
Simon Brach	71			
Joseph J. Lombardo	94			
Richard Appleby	100			

E X H I B I T S

<u>GOVERNMENT'S</u>	<u>DESCRIPTION</u>	<u>FOR ID.</u>	<u>IN EV.</u>
1	Advice of Rights	9	9
2	Document	30	
3	Document	37	

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

SIMON BRACH, :

Plaintiff-Petitioner, :

-against- :

75-C-1069

UNITED STATES OF AMERICA, :

Defendant. :

-----X

Appearances:

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BARTELS, District Judge



Petitioner Simon Brach moves, pursuant to 28 U.S.C. §2255, for an order vacating his sentence and judgment of conviction imposed by this Court on March 3, 1972, for unlawful possession and sale of "Unisonic" AM-FM stereos moving as part of or constituting a foreign shipment of freight in violation of 18 U.S.C. §§2, 659, and 2315, and incidental thereto, seeks discovery and an evidentiary hearing. Brach was sentenced to three years imprisonment on the possession count and four years probation on the sale count. On the same date a similar sentence and judgment of conviction was imposed on his mother, Zali Fried, who was sentenced to three years imprisonment on the possession count and two years probation on the sale count. On appeal the conviction was affirmed. United States v. Fried and Brach, 464 F.2d 983 (2d Cir.), cert. denied, 409 U.S. 1059 (1972). Subsequently, Brach was released on parole on September 20, 1973. Since that time he has, according to the petition and affidavit in opposition, been charged with a new one count indictment for theft from a foreign shipment.

On October 24, 1972, and again on July 10, 1974, Zali Fried moved for a new trial pursuant to Rule 33 of the

Federal Rules of Criminal Procedure, 18 U.S.C. Brach did not join in either motion. This Court denied the first motion of October 24, 1972, following a hearing (United States v. Fried, 359 F.Supp. 227 (E.D.N.Y. 1973)), but on October 12, 1973, the Court of Appeals reversed this order to the extent that this Court denied the motion on count 3, the "sale" count, on the ground of prosecutorial negligent non-disclosure of material information concerning witness Joseph Levy's testimony, and in all other respects affirmed the order and Zali Fried was thereafter required to serve her sentence. United States v. Fried, 486 F.2d 201 (2d Cir. 1973), cert. denied, 416 U.S. 983 (1974) ("Fried II"). The second motion of July 10, 1974, was denied by this Court on August 9, 1974, in an opinion dictated from the bench, from which Zali Fried took no appeal.

Brach's application at pages 2, 3 and 4 is based upon the same facts listed in Zali Fried's first new trial motion in 1972. After a hearing of this 1972 motion, at which Assistant United States Attorney Thomas Puccio testified, the Court denied the motion and also any further discovery. The Court of Appeals in its partial reversal had before it all the facts which petitioner now alleges in his



present petition and in rendering its opinion stated among other things: "[t]here is no showing that evidence regarding seizure of some of the stolen stereos in the possession of so-called 'legitimate' purchasers could not have been uncovered with due diligence prior to trial." Fried II, supra, at 203. At the present time petitioner wishes to relitigate that very issue.

#### I. Facts

Petitioner alleges two grounds for his application: (1) the ruling of the Court of Appeals in Fried II reversing Fried's conviction for sale of the stolen Unisonics, and (2) the allegedly newly discovered evidence introduced on behalf of Zali Fried at the second new trial motion which was not appealed. After reading and considering the petitioner's briefs and cases cited therein, we conclude that this motion must be denied in all respects.

As to the first ground, petitioner claims there is a difference between his case and the Fried case, in that there was no other evidence against him for both possession and sale independent of Levy's testimony, which the Court of

Appeals felt was tainted as far as Fried's conviction on the sale count was concerned. This is simply not the fact because there is other evidence against Brach on both counts. Levy's testimony as to Brach was corroborated as to both the sale and possession counts by the testimony of other witnesses. Fred Mele, a New York City policeman, testified that he knew Mr. and Mrs. Fried and Simon Brach and had worked for Brach as a truckdriver and previously delivered electronics, radios, phonographs and tape-recorders for him; that on November 3, 1970, at about 8:15 A.M., Brach came to him at the 90th Precinct in Williamsburg, Brooklyn and told him that he had some merchandise "a customer is waiting for," which was already on his truck and which he wished Mele to deliver. He testified that Brach said that he (Brach) would meet him at the place of delivery and then Mele would be "finished." Continuing, Mele stated that at the time of the request Brach had parked his truck across the street from Mele's precinct, which incidentally was in the same neighborhood as Fried Trading Company, the Fried family business. Mele testified that thereafter Mele drove the truck from the precinct to Orchard Street in Manhattan, where Mele delivered the contents to Joseph Levy. Mele



further stated that Brach was at Orchard Street in his own car at Levy's place when Mele arrived with the truck, and that Brach waved Mele and the truck over to the opposite side of the street where Levy came to the truck and Mele and Levy without Brach's help unloaded the merchandise, consisting of 50 cartons, for which Brach said he would get the receipt from Levy. Mele identified the cartons as approximately the same size as cartons introduced into evidence containing the stolen Unisonic stereos, though he could not identify them as the cartons he delivered. In addition, Patrolman Douglas LeVein testified that on November 4 and 5, 1970, he had seized from 130 Orchard Street, Levy's place of business, 82 Unisonics falling within the known range of stolen Unisonics, and special waterfront agent William Stockey testified that on November 4, 1970 he also seized 90 to 100 cartons of stolen Unisonics from Levy's warehouse at 130 Orchard Street.

The testimony of these three witnesses was sufficient circumstantial evidence to support Brach's conviction on both counts independently of Levy's testimony and, in addition, it corroborated Levy's testimony as to Brach and linked Brach as an aider and abettor to his mother's possession of stolen goods. It should be noted that Brach was charged not only with actual possession but also with aiding and abetting

such knowing possession by his mother, Zali Fried. The Court instructed the jury that all defendants were charged with aiding and abetting the possession as well as the sale of stolen stereos, knowing the same to be stolen.

The other ground for the §2255 application is the so-called new evidence disclosed on behalf of Zali Fried in her second trial motion of July, 1974, which was denied and from which decision she did not appeal. The charge is that there was confusion of serial numbers and carton numbers and a mix-up in the two shipments of the stereos which was exculpatory in nature, of which the Government had knowledge but failed to reveal the same to the defendants. In denying Zali Fried's second new trial motion, the Court found there was no basis for Zali Fried's allegations and that there was no prosecutorial misconduct involved; nor has the petitioner Brach shown in this application that there was such confusion in stereo and carton numbers involving exculpatory facts of which the Government had knowledge but failed to turn over to the defendants. As stated in the Government's affidavit in opposition at page 2, this Court in denying Zali Fried's motion found that, except for the consignee's list, the



Government had no knowledge of the items involved and that the items were insufficient to require a new trial, and further, that while the list was in the possession of the Government, it was not evidence that could "be considered exculpatory." (Hearing Transcript at p. 29.)

## II. Law

This is the fourth attempt of a member of the Fried family to circumvent the verdict of the jury convicting Zali Fried and her son, Simon Erach, as affirmed by the Court of Appeals in 464 F.2d 983 (2d Cir.), cert. denied, 409 U.S. 1059 (1972). Referring to petitioner's first ground for his application, it is vital to note that he never joined his mother in the first application for a new trial nor in the appeal to the Court of Appeals decided in 1974, nor in her second new trial motion in 1974. At this late date, having now been indicted again on another charge, he attempts to use 28 U.S.C. §2255 as a substitute remedy for Rule 33, F.R.Crim.P., from which he is now time barred by the two-year jurisdictional limitation. Section 2255 states that an application for relief may be made by a prisoner in custody who claims that he has a right to be released on the

grounds that sentence was imposed in violation of the Constitution or laws of the United States or that the court was without jurisdiction or that the sentence was in excess of the maximum or otherwise subject to collateral attack. We realize that such an attack is available even though no direct appeal was available to him or had been taken from the denials of the two motions for new trial, and that the petitioner, as indicated in the petition, must be considered "in custody" pursuant to the requirement of §2255.

In the decision denying Zali Fried's second new trial motion, this Court found that there was no prosecutorial misconduct, as more particularly described in the opinion rendered off the bench, see Hearing Transcript at pp. 28-31, and hence no violation of the Constitution or laws of the United States. See United States v. Keogh, 391 F.2d 138, 146-48 (2d Cir. 1968). Even without the testimony and circumstantial evidence supporting Brach's conviction on both counts, there is no basis in law for Brach at this late date to apply the Court of Appeals partial reversal in Fried II to Brach's circumstances. Both Brach and his mother had their day in court where full and fair consideration was given to Brach's constitutional claims, and he cannot now



✓ seek relief where he has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal. See Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969). In Townsend v. Sain, 372 U.S. 293, 317 (1963), the Supreme Court stated that "[t]he standard of inexcusable default set down in Fay v. Noia [372 U.S. 391 (1963)] adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures."

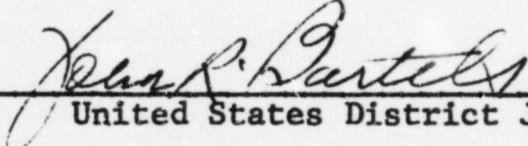
As to petitioner's second ground for the application, he attempts to avoid the time bar of Rule 33 by alleging that the Fried II case was an intervening change in law analogous to Davis v. United States, 417 U.S. 333 (1974), permitting a claim under §2255. In Davis the petitioner had been convicted for failure to report for induction but after such conviction the Supreme Court in the case of Gutknecht v. United States, 396 U.S. 295 (1970), held on virtually identical facts that Gutknecht's conviction was invalid. Therefore, upon Davis' §2255 application the Supreme Court held that his induction was invalid by reason of an intervening

change in law in Gutknecht. The factual context of the Fried case can in no manner be analogized to Davis because in Fried II there was no change, intervening or otherwise, in the law; there was simply the application by the Court of Appeals of a familiar principle of law reaching a result different from that reached by the application of the same law by the lower court. See United States v. Loschiavo, Docket No. 75-1310, at 2228-40 (2d Cir., filed Mar. 3, 1976).

Having considered Brach's claims in Zali Fried's second new trial motion and finding no basis in law or fact<sup>1/</sup> for an evidentiary hearing and no newly discovered evidence, the Court for the reasons heretofore stated denies Brach's petition in all respects.

SO ORDERED.

Dated: Brooklyn, N.Y.,  
March 9, 1976.

  
United States District Judge

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<sup>1/</sup> We find United States ex rel. Washington v. Vincent, 525 F.2d 262 (2d Cir. 1975), cited by petitioner, inapposite.



# AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 15th  
day of March, 1976 -----, I deposited in Mail Chute Drop for mailing in the  
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and  
State of New York, a GOVERNMENT'S APPENDIX -----  
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper  
directed to the person hereinafter named, at the place and address stated below:

----- Harry E. Youtt, Esq. -----

----- 919 Third Avenue -----

----- New York, N. Y. 10022 -----

Sworn to before me this  
15th day of March, 1976

*Olga S. Morgan*  
OLGA S. MORGAN  
Notary Public, State of New York  
No. 24-4601966  
Qualified in Kings County  
Commission Expires March 30, 1977

*Evelyn Cohen*